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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AJ24

Prevailing Rate Systems; Abolishment of the St. Louis, MO, Special Wage Schedule for Printing Positions

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule that will abolish the St. Louis, MO, Federal Wage System (FWS) special wage schedule for printing positions. Printing and lithographic employees in the St. Louis wage area will now be paid from the regular St. Louis appropriated fund FWS wage area schedule. This change is necessary because there are no longer enough printing and lithographic employees in the wage area to conduct the local special wage survey successfully.

DATES: *Effective Date:* This regulation is effective on January 18, 2001. *Applicability Date:* Agencies will place employees who are paid from the St. Louis special wage schedule on the St. Louis regular wage schedule on December 17, 2000.

FOR FURTHER INFORMATION CONTACT: Chenty I. Carpenter at (202) 606–8359; by FAX at (202) 606–4264; or by email at cicarpen@opm.gov.

SUPPLEMENTARY INFORMATION: On September 14, 2000, the Office of Personnel Management published an interim rule (65 FR 55431) to abolish the St. Louis, MO, Federal Wage System (FWS) special wage schedule for printing positions. The interim rule had a 30-day period for comment, during which we received no comments.

The Department of Defense (DOD) recommended that we abolish this special wage schedule because it has become extremely difficult for DOD to release adequate numbers of employees to conduct the local special wage survey successfully. The number of printing and lithographic employees in the wage area has declined from about 225 employees in 1985 to about 17 employees currently. These employees work in various locations throughout the St. Louis wage area. Twelve of these employees work for the Defense Logistics Agency, four work for the Department of the Army, and one works for the National Guard Bureau. DOD has found it increasingly difficult to comply with the requirement that employees paid from the special printing schedule participate in the local special wage survey process. The decline in employment is expected to continue until there are no longer any printing and lithographic employees in the wage area.

Printing and lithographic employees will convert to the St. Louis FWS regular wage schedule on a grade-for-grade basis. Each employee's new rate of pay will be set at the step rate for the applicable grade of the regular wage schedule that equals the employee's existing rate of pay. If an employee's existing pay rate falls between two steps on the regular schedule, the new rate will be set at the higher of the two steps. If an employee's existing pay rate is higher than the highest rate for his or her grade on the regular schedule, the employee will, if otherwise eligible, be entitled to pay retention. The Federal Prevailing Rate Advisory Committee, the national labor-management committee that advises OPM on FWS pay matters, reviewed and concurred by consensus with this change.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Accordingly, under the authority of 5 U.S.C. 5343, the interim rule (65 FR 55431) amending 5 CFR part 532 published on September 14, 2000, is adopted as final with no changes.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 00–32284 Filed 12–18–00; 8:45 am]

BILLING CODE 6325–01–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AJ23

Prevailing Rate Systems; Redefinition of the Los Angeles, CA, Appropriated Fund Wage Area

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to remove Inyo County, CA, from the Los Angeles, CA, appropriated fund Federal Wage System (FWS) wage area. The county, excluding the China Lake Naval Weapons Center portion, will be defined to the Las Vegas, NV, FWS wage area. This will affect FWS employees at Death Valley National Park by placing them on a higher wage schedule.

DATES: *Effective Date:* This regulation is effective on January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Chenty I. Carpenter by phone at (202) 606–2838, by FAX at (202) 606–4264, or by email at cicarpen@opm.gov.

SUPPLEMENTARY INFORMATION: On August 17, 2000, the Office of Personnel Management (OPM) published a proposed rule (65 FR 50165) to move Inyo County, California, from the Los Angeles, CA, appropriated fund Federal Wage System (FWS) wage area to the Las Vegas, NV, FWS wage area. The proposed rule had a 30-day period for public comment, during which we received no comments.

OPM considers the following regulatory criteria under 5 CFR 532.211 when defining FWS wage area boundaries:

(i) Distance, transportation facilities, and geographic features;

(ii) Commuting patterns; and

(iii) Similarities in overall population employment, and the kinds and sizes of private industrial establishments.

Inyo County is currently an area of application county in the Los Angeles wage area. Based on our analysis of the

regulatory criteria for defining appropriated fund FWS wage areas, we find that Inyo County, excluding the portion occupied by China Lake Naval Weapons Center, should be part of the Las Vegas wage area. The distance criterion is the major factor in our determination. The county is much closer to the Las Vegas survey area than to the Los Angeles survey area. Inyo County is approximately 429 km (267 miles) from Los Angeles and 194 km (120 miles) from Las Vegas. The county is approximately 203 km (126 miles) from Nellis Air Force Base, the Las Vegas wage area's host installation. We reviewed the other criteria, but they did not favor one wage area more than another. The Las Vegas, NV, FWS wage area will consist of two survey counties, Clark and Nye Counties, NV, and four area of application counties, Esmeralda and Lincoln Counties, NV, Mohave County, AZ, and Inyo County, CA.

China Lake Naval Weapons Center is located in Inyo, Kern, and San Bernardino Counties, CA. China Lake Naval Weapons Center will remain a part of the Los Angeles FWS wage area so that the installation can continue to be defined to a single wage area. The regulatory criteria we use to define FWS wage areas indicate that the main employment locations for FWS employees at China Lake are properly defined to the Los Angeles wage area.

The Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee that advises OPM on FWS pay matters, recommended these changes by consensus. Based on its review of the regulatory criteria for defining FWS wage areas, FPRAC recommended no other changes in the geographic definition of the Los Angeles FWS wage area.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, the Office of Personnel Management is amending 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

2. In appendix C to subpart B, the wage area listing for the State of California is amended by revising the listing for Los Angeles; and for the State of Nevada, by revising the listing for Las Vegas, to read as follows:

Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas

* * * * *

California

* * * * *

Los Angeles

Survey Area

California:
Los Angeles

Area of Application. Survey area plus:

California:
Inyo (Includes the China Lake Naval Weapons Center portion only)
Kern (Includes the China Lake Naval Weapons Center, Edwards Air Force Base, and portions occupied by Federal activities at Boron (City) only)
Orange
Riverside (Includes the Joshua Tree National Monument portion only)
San Bernardino (All of San Bernardino County except that portion occupied by, and south and west of, the Angeles and San Bernardino National Forests)
Ventura

* * * * *

Nevada

Las Vegas

Survey Area

Nevada:
Clark
Nye

Area of Application. Survey area plus:

Nevada:
Esmeralda
Lincoln
Arizona:
Mohave
California:
Inyo (Excludes the China Lake Naval Weapons Center portion only)

* * * * *

[FR Doc. 00–32285 Filed 12–18–00; 8:45 am]

BILLING CODE 6325–01–U

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AJ22

Prevailing Rate Systems; Abolishment of the Philadelphia, PA, Special Wage Schedule for Printing Positions

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule to abolish the Philadelphia, Pennsylvania, Federal Wage System (FWS) special wage schedule for printing positions. Printing and lithographic employees in the Philadelphia wage area will now be paid from the regular Philadelphia appropriated fund FWS wage area schedule. This change is necessary because there are no longer enough printing and lithographic employees in the wage area to conduct the local special wage survey successfully.

DATES: *Effective Date:* This regulation is effective on January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Chenty I. Carpenter by phone at (202) 606–2838, by FAX at (202) 606–4264, or by email at cicarpen@opm.gov.

SUPPLEMENTARY INFORMATION:

On August 17, 2000, the Office of Personnel Management (OPM) published an interim rule (65 FR 50127) to abolish the Philadelphia, PA, Federal Wage System (FWS) special wage schedule for printing positions. The interim rule had a 30-day period for public comment, during which we received no comments.

The Department of Defense (DOD) recommended that we abolish this special wage schedule because it has become extremely difficult for DOD to release adequate numbers of employees to conduct the local special wage survey successfully. The number of printing and lithographic employees in the wage area has declined from 117 employees in 1995 to about 5 employees currently. The decline in employees is expected to continue until there are no longer any printing and lithographic employees in the wage area. DOD found it increasingly difficult to comply with the requirement that employees paid from the special printing schedule participate in the local special wage survey process. The 1998 full-scale special wage survey required contacting 102 establishments in 5 counties in Pennsylvania and 3 counties in New Jersey.

Printing and lithographic employees converted to the Philadelphia FWS

regular wage schedule on the first day of the first applicable pay period beginning on or after September 18, 2000. Each employee's new rate of pay was set at the step rate for the applicable grade of the regular wage schedule that equaled the employee's existing rate of pay. If an employee's existing pay rate fell between two steps on the regular schedule, the new rate was to be set at the higher of the two steps.

The Federal Prevailing Rate Advisory Committee, the national labor-management committee that advises OPM on FWS pay matters, recommended this change by consensus.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Accordingly, under the authority of 5 US.C. 5343, the interim rule (65 FR 50127) amending 5 CFR part 532 published on August 17, 2000, is adopted as final with no changes.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 00–32283 Filed 12–18–00; 8:45 am]

BILLING CODE 6325–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. FV00–989–5 FIR]

Raisins Produced from Grapes Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, without change, the provisions of an interim final rule which decreased the assessment rate established for the Raisin Administrative Committee (Committee) for the 2000–01 and subsequent crop years from $8.50 to $6.50 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in any market. The Committee locally administers the Federal marketing order which regulates the handling of raisins produced from grapes grown in California (order). Authorization to assess raisin handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The crop year runs from August 1 through July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

EFFECTIVE DATE: January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Maureen T. Pello, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–5698.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 720–5698, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 989 (7 CFR part 989), both as amended, regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California raisin handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable raisins beginning on August 1, 2000, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule continues to decrease the assessment rate established for the Committee for the 2000–01 and subsequent crop years from $8.50 to $6.50 per ton of free tonnage raisins acquired by handlers, and reserve tonnage raisins released or sold to handlers for use in any market. The order authorizes volume control provisions that establish free and reserve percentages of raisins acquired by handlers. Free tonnage raisins may be sold by handlers to any outlet, and reserve tonnage raisins are held by handlers for the account of the Committee or released or sold to handlers for sale to any market. With projected assessable tonnage about 23,300 tons higher than last year's assessable tonnage, sufficient income should be generated at the lower assessment rate for the Committee to meet its anticipated expenses. This action was unanimously recommended by the Committee at a meeting on August 15, 2000.

Sections 989.79 and 989.80, respectively, of the order provide authority for the Committee, with the approval of the Department, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of California raisins. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have

an opportunity to participate and provide input.

A continuous assessment rate of $5.00 per ton was in effect for the 1996–97 and 1997–98 crop years. Due to short crops in 1998–99 and 1999–2000, the assessment rate for those years was raised to $8.50 per ton.

Regarding the 2000–01 crop year, the Committee recommended decreasing the assessment rate to $6.50 per ton of assessable raisins to cover recommended administrative expenditures of $2,145,000. This compares to budgeted expenses of $2,482,000 for the 1999–2000 crop year. Major expenditures include $660,500 for export program administration and related activities, $477,700 for salaries, $476,300 for contingencies, and $160,000 for compliance activities. Budgeted expenses for these items in 1999–2000 were $549,500, $425,000, $506,250, and $200,000, respectively.

The recommended $6.50 per ton assessment rate was derived by dividing the $2,145,000 in anticipated expenses by an estimated 330,000 tons of assessable raisins. The Committee recommended decreasing its assessment rate because the projected 2000–01 assessable tonnage of 330,000 tons is about 23,300 tons higher than last year's actual assessed tonnage. Thus, sufficient income should be generated at the lower assessment rate for the Committee to meet its anticipated expenses. Pursuant to § 989.81(a) of the order, any unexpended assessment funds from the crop year must be credited or refunded to the handlers from whom collected.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by the Secretary upon recommendation and other information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2000–01 budget and those for subsequent crop years will be reviewed and, as appropriate, approved by the Department.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 20 handlers of California raisins who are subject to regulation under the order and approximately 4,500 raisin producers in the regulated area. Small agricultural firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less that $5,000,000, and small agricultural producers are defined as those having annual receipts of less than $500,000. Thirteen of the 20 handlers subject to regulation have annual sales estimated to be at least $5,000,000, and the remaining 7 handlers have sales less than $5,000,000, excluding receipts from any other sources. No more than 7 handlers, and a majority of producers, of California raisins may be classified as small entities, excluding receipts from other sources.

This rule continues to decrease the assessment rate established for the Committee and collected from handlers for the 2000–01 and subsequent crop years from $8.50 to $6.50 per ton of assessable raisins acquired by handlers. The Committee unanimously recommended 2000–01 expenses of $2,145,000. Major expenditures include $660,500 for export program administration and related activities, $477,700 for salaries, $476,300 for contingencies, and $160,000 for compliance activities. Budgeted expenses for these items in 1999–2000 were $549,500, $425,000, $506,250, and $200,000, respectively. With anticipated assessable tonnage at 330,000 tons, about 23,300 tons higher than last year's actual assessed tonnage, sufficient income should be generated at the $6.50 per ton assessment rate to meet expenses. Pursuant to § 989.81(a) of the order, any unexpended assessment funds from the crop year must be credited or refunded to the handlers from whom collected.

The industry considered various alternative assessment rates prior to arriving at the $6.50 per ton recommendation. The Committee's Audit Subcommittee met on August 8, 2000, to review preliminary budget information. The subcommittee considered keeping the assessment rate at $8.50 per ton. However, this would have generated a projected $1 million in excess funds. The subcommittee considered reducing the rate to $7.50 per ton and ultimately recommended that rate to the Committee at its meeting on August 15, 2000. Other options were discussed at the Committee meeting, including decreasing the rate to $5.00 per ton. After much deliberation, the Committee voted to decrease the assessment rate to $6.50 per ton.

A review of statistical data on the California raisin industry indicates that assessment revenue has consistently been less than 1 percent of grower revenue in recent years. Although no official estimates or data are available for the upcoming season, it is anticipated that assessment revenue will likely continue to be less than 1 percent of grower revenue in the 2000–2001 crop year, especially with the 24 percent decrease in the assessment rate.

Regarding the impact of this action on affected entities, this action decreases the assessment rate imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the Audit Subcommittee's meeting on August 8, 2000, and the Committee's meeting on August 15, 2000, where this action was deliberated, were public meetings widely publicized throughout the raisin industry. All interested persons were invited to attend the meetings and participate in the industry's deliberations.

This action imposes no additional reporting or recordkeeping requirements on either small or large raisin handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, Committee and subcommittee meetings are widely publicized in advance and are held in a location central to the production area. The meetings are open to all industry members, including small business

entities, and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion.

An interim final rule concerning this action was published in the **Federal Register** on September 27, 2000 (65 FR 57941). Copies of the rule were mailed by the Committee staff to all Committee members and alternates, the Raisin Bargaining Association, handlers and dehydrators. In addition, the rule was made available through the Internet by the Office of the Federal Register. A 60-day comment period was provided for interested persons which ended November 27, 2000. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: http://www.ams.usda.gov/fv/moab.html. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

Accordingly, the interim final rule amending 7 CFR part 989 which was published at 65 FR 57941 on September 27, 2000, is adopted as a final rule without change.

Dated: December 13, 2000.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 00–32296 Filed 12–18–00; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AG58

List of Approved Spent Fuel Storage Casks: HI–STAR 100 Revision; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule: Correction.

SUMMARY: This document corrects a direct final rule appearing in the **Federal Register** on October 11, 2000 (65 FR 60339), that revises the Holtec International HI–Star 100 cask system listing within the ''List of approved spent fuel storage casks'' to include Amendment No. 1 to the Certificate of Compliance. This action is necessary to correct a typographical error.

EFFECTIVE DATE: If there are no adverse comments received, the direct final rule is effective on December 26, 2000.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Federal Register Liaison Officer, telephone (301) 415–7163.

SUPPLEMENTARY INFORMATION:

On page 60339, in the second column, in the **ADDRESSES** section, in the third paragraph, in the third line, the website address should be ''http://ruleforum.llnl.gov.''

Dated at Rockville, Maryland, this 13th day of December 2000.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Federal Register Liaison Officer.

[FR Doc. 00–32304 Filed 12–18–00; 8:45 am]

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DEPARTMENT OF EDUCATION

34 CFR Parts 606, 607, and 608

Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, American Indian Tribally Controlled Colleges and Universities Program, and Strengthening Historically Black Colleges and Universities Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: We are amending the regulations governing the Developing Hispanic-Serving Institutions, Strengthening Institutions, American Indian Tribally Controlled Colleges and Universities, and Strengthening Historically Black Colleges and Universities Programs to incorporate statutory changes made by the Higher Education Amendments of 1998 (1998 Amendments). The 1998 Amendments provide that if grantee institutions under the Developing Hispanic-Serving Institutions, Strengthening Institutions, American Indian Tribally Controlled Colleges and Universities, and Strengthening Historically Black Colleges and Universities Programs use grant funds to establish or increase endowment funds, we can subject that use to appropriate requirements under the Endowment Challenge Grant Program. These amendments to the regulations implement the statutory changes.

DATES: These regulations are effective January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Darlene Collins, U.S. Department of Education, 1990 K Street, NW., Room 6032, Washington, DC 20006–8512. Telephone: (202) 502–7576. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMEMTARY INFORMATION:

Background

As amended by the 1998 Amendments, sections 311(d)(1), 316(c)(3)(A), 323(b)(1), and 503(c)(1) of the Higher Education Act of 1965, as amended (HEA), authorize grantee institutions under the Strengthening Institutions, American Indian Tribally Controlled Colleges and Universities, Strengthening Historically Black Colleges and Universities, and Developing Hispanic Serving-Institutions Programs to use up to 20% of their grants funds to establish or increase endowment funds. Amended sections 311(d)(3), 316(c)(3)(C), 323(b)(3), and 503(c)(3) of the HEA provide, in effect, that we can subject an institution's use of grant funds for that purpose to appropriate requirements in the Endowment Challenge Grant Program.

We implemented the Endowment Challenge Grant Program requirements in regulations contained in 34 CFR part 628. In the **Federal Register** of March 21, 2000, (65 FR 15115–15118) we proposed to subject grantees' use of grant funds for endowments under the Strengthening Institutions,

Strengthening Historically Black Colleges and Universities, and Developing Hispanic Serving-Institutions Programs to the following Endowment Challenge Grant Program regulatory provisions: §§ 628.3, 628.6, 628.10, and 628.41 through 628.47.We revised the definition of the term ''endowment fund income'' to clarify that endowment fund income includes fund appreciation and retained fund interest and dividends. We revised the institutional match requirement to reflect the statutory requirement that the match must be made on at least a one-to-one basis, that is, each grant dollar to be used for endowment purposes must be matched with at least one non-Federal dollar. Finally, if an institution decides to use grant funds for endowment fund purposes it must immediately match those grant funds with non-Federal dollars.

These proposals were included in § 606.10(d) for the Developing Hispanic-Serving Institutions Program, § 607.10(d) for the Strengthening Institutions Program, and § 608.10(d) for the Strengthening Historically Black Colleges and Universities Program.

Changes from Proposed Regulations

On March 21, 2000, we published a notice of proposed rulemaking (NPRM) for these programs in the **Federal Register** (65 FR 15115). No comments were received on the proposed regulations. Except for minor editorial revisions, including the addition of specific references to the American Indian Tribally Controlled Colleges and Universities Program to clarify that these provisions are applicable to that program, there are no differences between the NPRM and these final regulations.

Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

Intergovernmental Review

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives in the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for these programs.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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To use PDF you must have Adobe Acrobat Reader, which is available free at either of the previous sites. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: http://www.access.gpo.gov/nara/index.html.

(Catalog of Federal Domestic Assistance Numbers: 84.031S, 84.031A, and 84.031B)

List of Subjects in 34 CFR Parts 606, 607, and 608

Colleges and universities, Grant programs-education, Reporting and recordkeeping requirements.

Dated: December 12, 2000.

A. Lee Fritschler,

Assistant Secretary, Office of Postsecondary Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by amending parts 606, 607, and 608 as follows:

PART 606—DEVELOPING HISPANIC-SERVING INSTITUTIONS PROGRAM

1. The authority citation for part 606 continues to read as follows:

Authority: 20 U.S.C. 1101 *et seq.*, unless otherwise noted.

2. Section 606.10 is amended by adding a new paragraph (d) to read as follows:

§ 606.10 What activities may and may not be carried out under a grant?

* * * * *

(d) *Endowment funds.* If a grantee uses part of its grant funds to establish or increase an endowment fund, it must comply with the provisions of §§ 628.3, 628.6, 628.10, and 628.41 through 628.47 of this chapter with regard to the use of those funds, except—

(1) The definition of the term ''endowment fund income'' in § 628.6 of this chapter does not apply. For the purposes of this paragraph (d), ''endowment fund income'' means an amount equal to the total value of the fund, including fund appreciation and retained interest and dividends, minus the endowment fund corpus;

(2) Instead of the requirement in § 628.10(a) of this chapter, the grantee institution must match each dollar of Federal grant funds used to establish or increase an endowment fund with one dollar of non-Federal funds; and

(3) Instead of the requirements in § 628.41(a)(3) through (a)(5) and the introductory text in § 628.41(b) and § 628.41(b)(2) and (b)(3) of this chapter, if a grantee institution decides to use any of its grant funds for endowment purposes, it must match those grant funds immediately with non-Federal funds when it places those funds into its endowment fund.

PART 607—STRENGTHENING INSTITUTIONS PROGRAM

3. The authority citation for part 607 continues to read as follows:

Authority: 20 U.S.C. 1057–1059c, 1066–1069f, unless otherwise noted.

4. Section 607.10 is amended by adding a new paragraph (d) to read as follows:

§ 607.10 What activities may and may not be carried out under a grant?

* * * * *

(d) *Endowment funds.* If a grantee uses part of its grant funds to establish or increase an endowment fund under paragraphs (b)(11) or (b)(13)(xiii) of this section, it must comply with the provisions of §§ 628.3, 628.6, 628.10 and 628.41 through 628.47 of this chapter with regard to the use of those funds, except—

(1) The definition of the term ''endowment fund income'' in § 628.6 of this chapter does not apply. For the purposes of this paragraph (d), ''endowment fund income'' means an amount equal to the total value of the fund, including fund appreciation and retained interest and dividends, minus the endowment fund corpus.

(2) Instead of the requirement in § 628.10(a) of this chapter, the grantee institution must match each dollar of Federal grant funds used to establish or increase an endowment fund with one dollar of non-Federal funds; and

(3) Instead of the requirements in § 628.41(a)(3) through (a)(5) and the introductory text in § 628.41(b) and § 628.41(b)(2) and (b)(3) of this chapter, if a grantee institution decides to use any of its grant funds for endowment purposes, it must match those grant funds immediately with non-Federal funds when it places those funds into its endowment fund.

PART 608—STRENGTHENING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES PROGRAM

5. The authority citation for part 608 continues to read as follows:

Authority: 20 U.S.C. 1060 through 1063a, 1063c, 1066, 1068, 1069c, 1069d, and 1069f, unless otherwise noted.

6. Section 608.10 is amended by adding a new paragraph (d) to read as follows:

§ 608.10 What activities may be carried out under a grant?

* * * * *

(d) *Endowment funds.* If a grantee uses part of its grant funds to establish or increase an endowment fund, it is subject to the provisions of §§ 628.3, 628.6, 628.10 and 628.41 through 628.47 of this chapter with regard to the use of those funds, except—

(1) The definition of the term ''endowment fund income'' in § 628.6 of this chapter does not apply. For the purposes of this paragraph (d), ''endowment fund income'' means an amount equal to the total value of the fund, including fund appreciation and retained interest and dividends, minus the endowment fund corpus;

(2) Instead of the requirement in § 628.10(a) of this chapter, the grantee institution must match each dollar of Federal grant funds used to establish or increase an endowment fund with one dollar of non-Federal funds; and

(3) Instead of the requirements in § 628.41(a)(3) through (a)(5) and the introductory text in § 628.41(b) and § 628.41(b)(2) and (b)(3) of this chapter, if a grantee institution decides to use any of its grant funds for endowment purposes, it must match those grant funds immediately with non-Federal funds when it places those funds into its endowment fund.

[FR Doc. 00–32199 Filed 12–18–00; 8:45 am]

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POSTAL SERVICE

39 CFR Part 111

Address Sequencing Service

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule adopts a proposal to amend section A920 of the Domestic Mail Manual (DMM) to provide an electronic address sequencing service.

EFFECTIVE DATE: July 5, 2001.

FOR FURTHER INFORMATION CONTACT: DeWitt Crawford, 901–681–4612.

SUPPLEMENTARY INFORMATION: On September 19, 2000, the Postal Service published in the **Federal Register** a proposed rule to amend section A920 of the Domestic Mail Manual (65 FR 56518). Five comments were received. All responses were in support of the proposal, and only one of the five offered suggested changes. In summary, the following concerns were offered: Concern in making sure that requestors of sequencing services are fully aware that owners of Computerized Delivery Sequence (CDS) qualified address files will include seeded addresses, provided by the USPS, for the purpose of fraud prevention. The same concern as indicated in number 1 in regards to list owners being notified of potential fraudulent use of their address files. Concern in the time frame and number of attempts customers can submit address files for qualification. Proposal to implement a simplified payment for electronic file services. Establishment of an effective date for the activation of electronic services and the discontinuation of the manual address card services. The first four suggestions were accepted, with minor modifications, but the fifth suggestion was not accepted because we felt that we need to evaluate how well the electronic process functions before we eliminate an existing service. The revisions to proposed DMM A920 are shown below.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 is revised to read as follows:

Authority: 5 U.S.C. 552 (a); 39 U.S.C. 101, 401, 403, 414, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

2. The Domestic Mail Manual is amended by revising module A to read as follows.

Domestic Mail Manual (DMM)

A Addressing

* * * * *

A900 Customer Support

* * * * *

A920 Address Sequencing Services

1.0 SERVICE LEVELS

[Amend 1.0 to add electronic file options to read as follows:]

The USPS provides the following levels of manual or electronic address sequencing service for city carrier routes, rural routes, highway contract routes, and post office box sections:

a. Sequencing of address cards or electronic address files.

b. Sequencing of address cards or electronic address files, plus inserting only blank cards for missing addresses or missing sequence numbers for the addresses missing from the electronic files.

c. Sequencing of address cards or electronic address files, plus inserting cards with addresses for missing or new addresses, or inserting addresses into electronic files for missing or new addresses.

d. For address cards or electronic files, if qualification is met, the Postal Service will provide seeded addresses to the list owners for inclusion in their address files for file protection.

e. If a request for sequencing contains a seeded address, the owner of the seeded address will be notified within 30 days of detection. If all known possibilities of fraud can not be ruled out, the request will be denied and the Postal Inspection Service will be notified.

[Amend the heading of 2.0 to read as follows:]

2.0 CARD OR FILE PREPARATION AND SUBMISSION

2.1 Color and Size

[Amend 2.1 to read as follows:]

When submitting cards, all address cards must be made of white or buff-colored card stock and of an identical size (5 to 8 5/16 inches long and 2 1/4 to 4 1/4 inches high). Blank cards for missing and/or new addresses must be of the same size as the submitted address cards but of a different color. A customer must provide enough cards to equal at least 10% of the number of address cards submitted.

2.2 Limitation

[Amend 2.2 to read as follows:]

The customer must not submit address cards or an address file in excess of 110% of the possible

deliveries for a specific 5-digit ZIP Code delivery area. Customers requesting the service level in A920.1.0c will be allowed three attempts to qualify a ZIP Code for the service within a 12-month period. Failure to qualify within three attempts within 12 months will result in a suspension of 1 year for any additional attempts to qualify the ZIP Code.

2.3 Addressing Format

[Amend 2.3 to read as follows:]

Addressing format is specific to the media being used.

a. Card Processing. Cards must be faced in the same direction and bear only one address each. The customer's current address information must be computer-generated, typed, or printed along the top of the card. The address must be within 1 inch from the top edge of the card in about the same location on each card submitted. Each card must include a complete address, but the ZIP Code is optional. Street designators may be abbreviated as shown in Publication 28, Postal Addressing Standards. When sequence cards are used to obtain address sequencing information for post office boxes, the box section number must be substituted for the carrier route number (if shown).

b. Electronic Processing. The customer must submit address files on electronic media, as described by the Postal Service. Call the National Customer Support Center at 1–800–331–5747 for a copy of the required format.

2.4 Header Cards

[Amend the first sentence of 2.4 and add a second sentence to read as follows:]

When submitting address cards customers must provide carrier route header cards, prepared with standard 80-column computer card stock (or another size as described above). The header cards must be typed, computer-generated, or printed by the customer. * * *

2.5 Delivery Unit Summary

[Amend 2.5 to read as follows:]

A Delivery Unit Summary must be typed, computer-generated, or printed, and provided by the customer for card processing. A printed copy or electronic file will be acceptable for address file submissions. When submitting address cards, an original and two copies must be submitted for each 5-digit ZIP Code delivery area. When submitting an address file, an original and two copies of a printed form or one electronic file must be submitted for each 5-digit ZIP Code delivery area. This form, used by the Postal Service to provide summary information to the customer, is necessary for calculating total charges for the service level provided. For address card submissions, the original is returned to the customer with the cards as the customer's bill. For electronic address file submissions, a computer-generated Delivery Unit Summary is returned as the customer's bill. Upon receipt of payment, the ZIP Code will be qualified for Computerized Delivery Sequence (CDS), and product fulfillment will begin. Examples of the required hardcopy or electronic format of the Delivery Unit Summary can be obtained from the National Customer Support Center (see G043 for address).

2.6 5-digit ZIP Codes

[Amend the first sentence of 2.6 to read as follows:]

When submitting address cards, the cards for each 5-digit ZIP Code area must be placed in separate containers, each with an envelope affixed containing a packing list and Delivery Unit Summary sheets for that 5-digit ZIP Code area. * * *

[Amend the heading and text of 2.7 to read as follows:]

2.7 Submitting Cards or Electronic Files

The designated place for submission of addresses for sequencing depends on the type of media used.

a. *Card Processing.* The customer must submit the containers of address cards to the district manager of Address Management Systems for carrier routes within the corresponding district. (Exception: Address cards only for addresses in the city where the customer is located may be submitted to the postmaster of that city for sequencing and correction.) Unless directed otherwise, the customer must address containers of address cards to: Manager Address Management Systems, United States Postal Service, [Street Address], [City/State/Zip+4].

b. *Electronic Processing.* The customer must submit address files on electronic media, as described by the Postal Service, to: Computerized Delivery Sequencing Department, National Customer Support Center, United States Postal Service, 6060 Primacy PKWY STE 201, Memphis TN 38188–0001.

2.8 Postage

[Amend 2.8 by inserting the following after the first sentence:]

* * * Address files can be mailed at the appropriate rate or be electronically transmitted, as determined by the USPS, to the National Customer Support Center. * * *

2.9 USPS Sequencing

[Amend 2.9 to read as follows:]

Unsequenced address cards received at post offices or unsequenced address files received at the National Customer Support Center will be arranged in sequence of carrier route delivery without charge. Cards with incorrect or undeliverable addresses are removed from carrier route bundles, bundled separately, and returned to the customer. When address files are submitted, incorrect or undeliverable addresses are removed from the original file and returned as a separate file.

[Amend the heading of 2.10 to read as follows:]

2.10 USPS Time Limits and Billing

[Amend 2.10 so that the first sentence reads as follows:]

The post office or the National Customer Support Center, whichever performs the service, returns the cards or address file and the bill for applicable charges to the customer within 15 working days after receiving a properly prepared request for address sequencing. * * *

2.11 Seasonal Addresses

[Amend 2.11 to read as follows:]

Under all service levels, correct addresses subject to seasonal occupancy, but which do not indicate seasonal treatment, will be identified with an ''S'' on cards or a flag on address files. If the address is included in a series such as those used for apartment buildings, trailer parks, and seasonal delivery areas in general, the appropriate ''seasonal'' indicator box is checked on the card or flagged on the address file. When correct address cards or address files that are not subject to seasonal occupancy but that include seasonal treatment notations are submitted, the seasonal indicator is marked out on cards or left blank on address files. For cards, a rubber band is placed around the card to identify it before it is put in carrier route sequence order in the returned deck of cards. No charge is assessed for this service.

[Amend the heading of 3.0 to read as follows:]

3.0 SEQUENCING CARDS WITH BLANKS FOR MISSING ADDRESSES OR SEQUENCING ADDRESSES FILES WITH MISSING SEQUENCE NUMBERS

3.1 USPS Sequencing

[Amend 3.1 to read as follows:]

USPS employees at post offices (for cards) or the National Customer Support Center (for address files) arrange unsequenced addresses in sequence of

carrier route delivery without charge, remove incorrect or undeliverable addresses and, if cards, bundle separately for return to the customer, insert a blank card or missing sequence number (for address files only) for each existing address that is not included in the customer's cards or address file. (If several addresses in a series are missing, a single blank card is inserted for the series showing the number of missing addresses, or for address files a series of missing sequence numbers will be omitted identifying the number of missing addresses.)

[Amend the heading of 3.2 to read as follows:]

3.2 USPS Time Limits and Billing

[Amend 3.2 to read as follows:]

The post office (for cards) or the National Customer Support Center (for address files) returns the cards or address file along with a bill for applicable charges to the customer within 15 working days after receiving a properly prepared request for address sequencing. This time limit does not apply to cards received between November 16 and January 1, which are sequenced as promptly as possible.

[Amend the heading of 4.0 to read as follows:]

4.0 SEQUENCING WITH ADDRESS CARDS OR ADDRESS FILE SEQUENCING WITH ADDRESSES ADDED FOR MISSING AND NEW ADDRESSES

4.1 USPS Sequencing

[Amend 4.1 to read as follows:]

USPS employees at post offices (for cards) or the National Customer Support Center (for address files) arrange unsequenced addresses in sequence of carrier route delivery without charge, remove incorrect or undeliverable addresses and, if cards, bundle separately for return to the customer or, if an address file, return as a separate file, and add new or missing addresses (including rural address conversions to city delivery) for each existing address that is not included in the customer's cards or address file.

[Amend the heading and text of 4.2 to read as follows:]

4.2 Separate Address Groups

Separate groups of address cards must be submitted for the addresses in each 5-digit ZIP Code delivery area: city carrier (residential addresses only); city carrier (business addresses only); city carrier (combination of residential and business addresses); rural and highway contract route addresses; or post office box addresses (whether business, residential, or a combination). If submitting an electronic address file, a single file meeting the same requirements is acceptable. Each group must be accompanied by a statement showing:

a. Types of addresses (*i.e.,* residential, business, or a combination).

b. Number of addresses on the cards or in the address file.

c. Name, mailing address, and telephone number of the list owner or agent.

* * * * *

4.4 Address Percentage

[Amend 4.4 to read as follows:]

For the 5-digit ZIP Code area, the mailing list that the cards or address file represents must contain 90% of all possible residential or business city carrier addresses for addresses in the respective address group, 90% of all city carrier addresses for addresses in a combination residential/business address group, or 90% of all possible deliveries for addresses in rural/highway contract route and post office box groups.

* * * * *

[Amend the heading and the first sentence of 4.6 to read as follows:]

4.6 Resubmitting Cards or Address File

Customers must monitor community growth and determine when address cards or address files need to be submitted for resequencing to maintain the 90% eligibility level of address coverage. * * *

5.0 SERVICE CHARGES

5.1 Basic Service

[Amend the first sentence of 5.1 to read as follows:]

For sequencing of address cards or address files, the applicable fee is charged for each address card or address that is removed because of an incorrect or undeliverable address. * * *

5.2 Blanks for Missing Addresses

[Amend 5.2 to read as follows:]

For sequencing of address cards or address files with total possible deliveries shown, the applicable fee is charged for each address card or address that is removed because it is incorrect or undeliverable. No charge is assessed for the insertion of blank cards or missing sequence numbers (for address files) showing the range of missing addresses in a submitted list.

5.3 Missing or New Addresses

[Amend the first sentence of 5.3 to read as follows:]

For sequencing of address cards or address files with missing or new addresses added, the applicable fee is charged for each address card or address that is removed because it is incorrect or undeliverable, and for each address (possible delivery) that is added to the customer's list. * * *

* * * * *

5.5 Free Services

[Amend 5.5a to read as follows:]

These services are provided at no charge for all three levels of service:

a. If the customer includes a rural address (box number) in a deck of cards or address file submitted for sequencing, and a street address is assigned to that box number so it can be served on a city delivery route, a correct address card or address is included at no charge.

* * * * *

6.0 Submitting Properly Sequenced Mailings

6.1 Customer Responsibility

[Amend the first sentence in 6.1 to read as follows:]

The customer must ensure that mailings are prepared in correct carrier route delivery sequence, and resequence cards or an address file when necessary. * * *

6.2 Changes

[Amend 6.2 to read as follows:]

When delivery changes affect delivery sequence but do not cause scheme changes, card customers will be notified in writing and must then submit cards for the affected routes or the complete ZIP Code for resequencing. Computerized Delivery Sequence (CDS) customers will automatically receive an updated electronic file from the Postal Service.

6.3 Out-of-Sequence

[Amend the third sentence in 6.3 to read as follows:]

* * * If the customer does not take corrective action, the USPS gives written notice that the customer is no longer allowed to submit address cards to the post office or address files to the National Customer Support Center for sequencing. * * *

6.4 Reinstatement

[Amend 6.4 to read as follows:]

Generally, a customer denied address card or address file sequencing service for a specific ZIP Code may not submit address cards (to the post office) or address files (to the National Customer Support Center) for sequencing where that sequencing service was terminated for 1 year after the effective date of termination. After that time, the customer is again authorized to submit

the ZIP Code address cards (to the post office) or address files (to the National Customer Support Center) for sequencing. At any time during the year after termination of service, the customer may renew the submission if the postmaster (for address cards) or the National Customer Support Center (for address files) is convinced that the customer has taken all necessary action to correct the past errors.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 00–32159 Filed 12–18–00; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[CA224–0263; FRL–6864–3]

Clean Air Act Final Interim Approval of the Operating Permits Program; Approval of State Implementation Plan Revision for the Issuance of Federally Enforceable State Operating Permits; Antelope Valley Air Pollution Control District, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval.

SUMMARY: The EPA is promulgating interim approval of the Operating Permits Program submitted by the California Air Resources Board on behalf of the Antelope Valley Air Pollution Control District (APCD), California (Antelope Valley or District) for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources. In addition, EPA is promulgating final approval of a revision to Antelope Valley's portion of the California State Implementation Plan (SIP) regarding synthetic minor regulations for the issuance of federally enforceable state operating permits (FESOP). In order to extend the federal enforceability of state operating permits to hazardous air pollutants (HAP), EPA is also finalizing approval of Antelope Valley's synthetic minor regulations pursuant to section 112(l)of the Clean Air Act (CAA or Act). Finally, today's action grants final approval to Antelope Valley's mechanism for receiving delegation of section 112 standards as promulgated.

DATES: *Effective date:* January 18, 2001.

Expiration date: January 11, 2003.

ADDRESSES: Copies of the District's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: Permits Office, Air–3, Air Division, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105.

Copies of the submitted rules are also available for inspection at the following locations:

California Air Resources Board, 2020 L Street, Sacramento, CA 95814

Antelope Valley Air Pollution Control District, 43301 Division Street, Suite 206, Lancaster, CA 93539–4409

FOR FURTHER INFORMATION CONTACT: Duong Nguyen (telephone 415/744–1142), Mail Code Air–3, U.S. Environmental Protection Agency, Region IX, Air Division, 75 Hawthorne Street, San Francisco, CA 94105.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Act) and implementing regulations at 40 Code of Federal Regulations (CFR) part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

On March 31, 2000, EPA proposed interim approval of the operating permits program for Antelope Valley APCD, California. See 65 FR 17231. The **Federal Register** document also proposed approval of the District's interim mechanism for implementing section 112(g) and program for delegation of section 112 standards as promulgated. Public comment was solicited on these proposed actions. EPA received no public comment on the proposal. In this notice, EPA is promulgating interim approval of Antelope Valley's operating permits program. EPA is also clarifying the section 112(g) implementation discussion in the proposed rulemaking. The clarification is not a substantive change from the proposed rulemaking (see II.B.2). This final rulemaking also approves the delegation mechanism to implement section 112(l) as noted above. On June 28, 1989 (54 FR 27274), EPA published criteria for approving and incorporating into the SIP regulatory programs for the issuance of federally enforceable state operating permits. Permits issued pursuant to a program meeting the June 28, 1989 criteria and approved into the SIP are considered federally enforceable for criteria pollutants. The synthetic minor mechanism may also be used to create federally enforceable limits for emissions of HAP if it is approved pursuant to section 112(l) of the Act.

In the March 31, 2000 **Federal Register** document, EPA also proposed approval of Antelope Valley's synthetic minor program for creating federally enforceable limits in District operating permits. In this document, EPA is promulgating approval of the synthetic minor program for Antelope Valley as a revision to the District's SIP and pursuant to section 112(l) of the Act.

II. Final Action and Implications

A. Analysis of State Submission

Comments

On March 31, 2000, EPA proposed interim approval of Antelope Valley's title V operating permits program as it was submitted on January 26, 1999. EPA received no adverse public comment on Antelope Valley's title V operating permits program, the proposed approval of Antelope Valley's synthetic minor program, or program for receiving section 112(1) standards as promulgated.

B. Final Action

1. Title V Operating Permits Program

The EPA is promulgating interim approval of Antelope Valley's title V operating permits program as submitted on January 26, 1999. EPA did not receive any comments on the changes that were outlined as necessary for full approval. Therefore, the program deficiencies described in the proposed rulemaking, under II.B.1.(a), Proposed Interim Approval, and the legislative deficiency outlined under II.B.1.(b), Legislative Source Category-Limited Interim Approval Issue, must be corrected in order for the District to be granted full approval. The scope of the Antelope Valley's part 70 program approved in this notice applies to all part 70 sources (as defined in the approved program) within the District, except any sources of air pollution over which an Indian Tribe has jurisdiction. See, e.g., 59 FR 55813, 55815–55818

(Nov. 9, 1994). The term ''Indian Tribe'' is defined under the Act as ''any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'' See section 302(r) of the CAA; see also 59 FR 43956, 43962 (Aug. 25, 1994); 58 FR 54364 (Oct. 21, 1993).

This interim approval, which may not be renewed, extends until January 21, 2003. During this interim approval period, Antelope Valley is protected from sanctions, and EPA is not obligated to promulgate, administer and enforce a Federal operating permits program in this District. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of this interim approval, as does the 3-year time period for processing the initial permit applications. If Antelope Valley fails to submit a complete corrective program for full approval by July 21, 2002, EPA will start an 18-month clock for mandatory sanctions. If the District then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b)of the Act, which will remain in effect until EPA determines that the District has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of Antelope Valley, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that the District has come into compliance. In any case, if, six months after application of the first sanction, Antelope Valley still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves Antelope Valley's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date the District has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of Antelope Valley, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that the District has come into compliance. In all cases, if, six months after EPA applies the first sanction, Antelope Valley has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if Antelope Valley has not submitted a timely and complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to the District's program by the expiration of this interim approval and that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a federal permits program for Antelope Valley upon interim approval expiration.

2. Implementing Section 112(g)

In the March 31, 2000 proposed rulemaking for interim approval of Antelope Valley's title V operating permits program, EPA proposed approving the use of Antelope Valley's preconstruction review program. The proposal was intended as a mechanism to implement section 112(g) during the transition period between promulgation of EPA's section 112(g) rule and adoption by Antelope Valley of rule(s) specifically designed to implement section 112(g).

This final rulemaking clarifies the proposed rulemaking by noting that the section 112(g) rule, titled ''Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources,'' was actually promulgated by EPA on December 27, 1996. The rule specified that permitting authorities must adopt a program (rule) to implement section 112(g) with an effective date of June 29, 1998, and that a permitting authority must certify and notify EPA by this date that the program meet the requirements of 112(g). A subsequent EPA rulemaking on June 30, 1999 granted a 30-month transitional period to permitting authorities that were unable to initiate a program to implement section 112(g) after June 29, 1998. During this transitional period, which expires on December 29, 2000, a permitting authority may (1) Request EPA to issue section 112(g) determinations, or (2) make section 112(g) determinations and issue a notice of Maximum Available Control Technology (MACT) that will become final and legally enforceable after EPA concurs in writing with the permitting authority's determination. Failure by the permitting authority to adopt a program to implement section 112(g) after the transitional period ends shall be construed as a failure by the permitting authority to adequately administer and enforce its title V operating permits program and shall constitute cause by EPA to apply the sanctions and remedies set forth in the Clean Air Act section 502(I).

On July 24, 1998, Antelope Valley submitted a letter to EPA indicating its intention to rely on an existing, but incomplete Toxic New Source Review rule and case-by-case MACT determinations in the transitional period to comply with the section 112(g) rule. Antelope Valley is in the process of developing and adopting a revised rule to implement section 112(g) by December 2000.

This final rulemaking hereby reiterates that failure by Antelope Valley to adopt a program (rule) to implement section 112(g) after December 29, 2000 shall be viewed as failure to adequately administer and enforce its title V operating permits program and could trigger sanctions and remedies as prescribed in section 502 of the Act. Since this section 112(g) implementation discussion merely clarifies the language in the proposed rulemaking on March 31, 2000 and provides additional information on the issue, it is not a substantive change from the proposed rulemaking.

3. Program for Delegation of Section 112 Standards as Promulgated

Requirements for part 70 program approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the District's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is also promulgating approval under section 112(l)(5) and 40 CFR 63.91 of Antelope Valley's program for receiving delegation of section 112 standards that are unchanged from the federal standards as promulgated. This program for delegations applies to both existing and future standards but is limited to sources covered by the part 70 program.

4. State Operating Permit Program for Synthetic Minors

EPA is promulgating full approval of Antelope Valley's synthetic minor operating permit program, adopted by the District on March 17, 1998, and submitted to EPA by the California Air

Resources Board, on behalf of Antelope Valley, on February 16, 1999. The synthetic minor operating permit program is being approved into Antelope Valley's SIP pursuant to part 52 and the five approval criteria set out in the June 28, 1989 Federal Register document (54 FR 27282). EPA is also promulgating full approval pursuant to section 112(l)(5) of the Act so that HAP emission limits in synthetic minor operating permits may be deemed federally enforceable.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Executive Order 13045

Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

C. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

D. Executive Order 13132

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612, Federalism and 12875, Enhancing the Intergovernmental Partnership. Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely acts on a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply act on requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to today's action because it does not require the public to perform activities conducive to the use of VCS.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must

submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major'' rule as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 20, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

I. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action acts on pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Operating permits, and Reporting and recordkeeping requirements.

Dated: August 21, 2000.

Felicia Marcus,

Regional Administrator, Region 9.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(262)(i)(E) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(262) * * *

(i) * * *

(E) Antelope Valley Air Pollution Control District.

(1) Rule 225, adopted March 17, 1998.

* * * * *

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

2. Appendix A to part 70 is amended by adding paragraph (ii) to the entry for California to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

California

* * * * *

(ii) Antelope Valley Air Pollution Control District (complete submittal received on January 26, 1999); interim approval effective on January 18, 2001; interim approval expires January 21, 2003.

* * * * *

[FR Doc. 00–32031 Filed 12–18–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 92–3, RM–7874, RM–7958]

Radio Broadcasting Services; Prineville and Sisters, OR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document dismisses a Petition for Reconsideration filed jointly by multiple licensees in Oregon directed to the *Report and Order* in this proceeding which upgraded Station KPXA, Sisters, Oregon, to specify operation on Channel 281C1. *See* 57 FR 47006, October 14, 1992.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order* in MM Docket No. 92–3, adopted December 6, 2000, and released December 8, 2000. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals ll, CY–A257, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3805, 1231 M Street, NW, Washington, DC 20036.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 00–32245 Filed 12–18–00; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 002767; MM Docket No. 00–150; RM–9944]

Radio Broadcasting Services; Lewistown, MT

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 300C1 at Lewistown, Montana, in response to a petition filed by Lewistown Radio. *See* 65 FR 53974, September 6, 2000. The coordinates for Channel 300C1 at Lewistown are 47–03–45 NL and 109–25–39 WL. Although concurrence of the Canadian Government has been requested for the allotment of Channel 300C1, notification has not been received. Therefore, operation with the facilities specified for Lewistown herein is subject to modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1991 Canada-USA FM Broadcast Agreement or if specifically objected to by Canada. A filing window for Channel 300C1 at Lewistown will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

DATES: Effective January 22, 2001.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 00–150, adopted November 29, 2000, and released December 8, 2000.

The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC. 20036, (202) 857–3800, facsimile (202) 857–3805.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Montana, is amended by adding Channel 300C1 at Lewistown.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 00–32246 Filed 12–18–00; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 00–2773; MM Docket No. 00–107; RM–9891]

Radio Broadcasting Services; Florence and Comobabi, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 276C for Channel 276C1 at Florence, Arizona, and modifies the license of Station KCDX accordingly, as requested by Desert West Air Ranchers. Additionally, Channel *275A, Comobabi, Arizona, is removed from Section 73.202(b), the Table of FM Allotments since no expression of interest in retaining a Class A channel at that community was received. *See* 65 FR 41037, July 3, 2000. Coordinates used for Channel 276C at Florence, Arizona, are 32–48–45 NL and 110–57–30 WL. As Florence is located within 320 kilometers (199 miles) of the U.S.-Mexico border, concurrence of the Mexican government to this allotment was requested, but has not been received. Therefore, the allotment of Channel 276C at Florence is conditioned on concurrence of the Mexican government in accordance with the 1992 USA-Mexico FM Broadcast Agreement.

DATES: Effective January 22, 2001.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 00–107, adopted November 29, 2000, and released December 8, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center (Room CY–A257), 445 Twelfth Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by removing Comobabi, Channel *275A.

3. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by removing Channel 276C1 and adding Channel 276C at Florence.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 00–32248 Filed 12–18–00; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. RSOR–6; Notice No. 49]

RIN 2130–AA81

Alcohol and Drug Testing: Determination of Minimum Random Testing Rates for 2001

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of determination.

SUMMARY: Using data from Management Information System annual reports, FRA has determined that the 1999 rail industry random testing positive rate was .82 percent for drugs and .13 percent for alcohol. Since the industry-wide random drug testing positive rate continues to be below 1.0 percent, the Federal Railroad Administrator (Administrator) has determined that the minimum annual random drug testing rate for the period January 1, 2001 through December 31, 2001 will remain at 25 percent of covered railroad employees. Since the random alcohol testing violation rate has remained below .5 percent for the last two years, the Administrator has determined that the minimum random alcohol testing rate will remain at 10 percent of covered railroad employees for the period January 1, 2001 through December 31, 2001.

DATES: This notice is effective December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Lamar Allen, Alcohol and Drug Program Manager, Office of Safety Enforcement, Mail Stop 25, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20005, (Telephone: (202) 493–6313).

SUPPLEMENTARY INFORMATION:

Administrator's Determination of 2001 Random Drug and Alcohol Testing Rates

In a final rule published on December 2, 1994 (59 FR 62218), FRA announced that it will set future minimum random drug and alcohol testing rates according to the rail industry's overall positive rate, which is determined using annual railroad drug and alcohol program data taken from FRA's Management Information System. Based on this data, the Administrator publishes a **Federal Register** notice each year, announcing the minimum random drug and alcohol testing rates for the following year (see 49 CFR §§ 602 and 608).

Under this performance-based system, FRA may lower the minimum random drug testing rate to 25 percent whenever the industry-wide random drug positive rate is less than 1.0 percent for two calendar years while testing at 50 percent. (For both drugs and alcohol, FRA reserves the right to consider other factors, such as the number of positives in its post-accident testing program, before deciding whether to lower annual minimum random testing rates). FRA will return the rate to 50 percent if the industry-wide random drug positive rate is 1.0 percent or higher in any subsequent calendar year.

In 1994, FRA set the 1995 minimum random drug testing rate at 25 percent because 1992 and 1993 industry drug testing data indicated a random drug testing positive rate below 1.0 percent; since then FRA has continued to set the minimum random drug testing rate at 25 percent as the industry positive rate has consistently remained below 1.0 percent. In this notice, FRA announces that the minimum random drug testing rate will remain at 25 percent of covered railroad employees for the period January 1, 2001 through December 31, 2001, since the industry random drug testing positive rate for 1999 was .82 percent.

FRA implemented a parallel performance-based system for random alcohol testing. Under this system, if the industry-wide violation rate is less than 1.0 percent but greater than .5 percent, the rate will be 25 percent. FRA will raise the rate to 50 percent if the industry-wide violation rate is 1.0 percent or higher in any subsequent calendar year. FRA may lower the minimum random alcohol testing rate to 10 percent whenever the industry-wide violation rate is less than .5 percent for two calendar years while testing at a higher rate. Since the industry-wide violation rate for alcohol has remained below .5 percent for the last two years, FRA is maintaining the minimum random alcohol testing rate at 10 percent of covered railroad employees for the period January 1, 2001 through December 31, 2001.

This notice sets the *minimum* random testing rates required next year. Railroads remain free, as always, to conduct random testing at higher rates.

Issued in Washington, DC. on December 14, 2000.

Jolene M. Molitoris,

Federal Railroad Administrator.

[FR Doc. 00–32321 Filed 12–18–00; 8:45 am]

BILLING CODE 4910–06–P

Proposed Rules

Federal Register
Vol. 65, No. 244
Tuesday, December 19, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AJ30

Prevailing Rate Systems; Change in the Survey Cycle for the Pennington, SD, Nonappropriated Fund Wage Area

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing a proposed rule that would change the timing of local wage surveys in the Pennington, South Dakota, nonappropriated fund (NAF) Federal Wage System (FWS) wage area. The change would help balance the workload for the Department of Defense and improve the amount and quality of data it collects during local annual wage surveys in the Pennington wage area.

DATES: The Office of Personnel Management must receive comments by January 18, 2001.

ADDRESSES: Send or deliver comments to Donald J. Winstead, Assistant Director for Compensation Administration, Workforce Compensation and Performance Service, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415–8200, or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Chenty I. Carpenter at (202) 606–8359; by FAX at (202) 606–4264; or by email at cicarpen@opm.gov.

SUPPLEMENTARY INFORMATION: The Department of Defense (DOD) has requested that the Office of Personnel Management (OPM) change the timing of local wage surveys in the Pennington, South Dakota, nonappropriated fund (NAF) Federal Wage System (FWS) wage area. Full-scale wage surveys currently begin in January of each even-numbered fiscal year. Full-scale wage surveys would begin in the future in June of each even-numbered fiscal year. Under section 532.207 of title 5, Code of Federal Regulations, the scheduling of wage surveys takes into consideration the best timing in relation to wage adjustments in the principal local private enterprise establishments, reasonable distribution of workload of the lead agency, timing of surveys for nearby wage areas, and scheduling relationships with other pay surveys.

DOD asked OPM to change the starting time for local wage surveys in the Pennington wage area to June of even fiscal years to help avoid the problems created by inclement weather in western South Dakota during the month of January and to balance the overall workload of its NAF survey office. DOD would conduct its regular wage-change survey in January 2001, then it would conduct full-scale wage surveys in Pennington County in June 2001 and June 2002.

The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, recommended by consensus that we change the full-scale survey cycle for the Pennington NAF wage area from January of even-numbered fiscal years to June of even-numbered fiscal years.

Regulatory Flexibility Act

I certify that this regulation would not have a significant economic impact on a substantial number of small entities because it would affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, the Office of Personnel Management proposes to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

Appendix A to Subpart B of Part 532 [Amended]

2. Appendix B to Subpart B is amended by revising under the State of South Dakota the listing of beginning month of survey from ''January'' to ''June'' for the Pennington NAF wage area.

[FR Doc. 00–32286 Filed 12–18–00; 8:45 am]
BILLING CODE 6325–01–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS No. 2068–00]

RIN 1115–AF85

Adding Actuaries and Plant Pathologists to Appendix 1603.D.1 of the North American Free Trade Agreement

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service's (Service) Regulations by adding the occupations of actuary and plant pathologist to the list of professions in Appendix 1603.D.1 to Annex 1603 of the North American Free Trade Agreement (NAFTA). This rule also proposes to modify the licensure requirements for Canadian citizens seeking admission to the United States as TN nonimmigrant aliens. These amendments are being proposed to reflect the agreements made among the three parties to the NAFTA. This rule will facilitate travel to the United States and benefit United States businesses.

DATES: Written comments must be submitted on or before February 20, 2001.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference the INS number 2068–00 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: John W. Brown, Adjudications Officer,

Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 353–8177.

SUPPLEMENTARY INFORMATION:

What Is the NAFTA?

On December 17, 1992, The United States, Canada and Mexico signed the North American Free Trade Agreement (NAFTA). The NAFTA entered into force on January 1, 1994, creating one of the largest trading areas in the world. Besides trade, NAFTA allows for the temporary entry of qualified business persons from each of the parties to the agreement. The NAFTA is comprised of 22 chapters. Chapter 16 of the NAFTA is entitled ''Temporary Entry of Business Persons,'' and in addition to reflecting the preferential trading relationship between the parties to the agreement, it reflects the member nations' desire to facilitate temporary entry on a reciprocal basis. It also establishes procedures for temporary entry, addresses the need to ensure border security and seeks to protect the domestic labor force in the member nations.

Articles 1605 of Chapter 16 of the NAFTA also established a Temporary Entry Working group (TEWG), comprised of representatives of each of the parties to the NAFTA, including immigration officials. The working group is required to meet at least once a year to consider several issues including the development of measures to further facilitate temporary entry of business persons on a reciprocal basis as well as proposed modifications of or additions to Chapter 16.

What Business Persons Are Covered Under the NAFTA?

Annex 1603 to Article 1603 of the NAFTA establishes 4 categories of business persons to be allowed temporary entry into the territory of another NAFTA party. The 4 categories are: (1) Business visitors; (2) traders and investors; (3) intracompany transferees; and (4) professionals.

Business visitors under the NAFTA are admitted to the United States under the B–1 nonimmigrant classification [INA 101(a)(15)(B)]. A business visitor is a business person from another NAFTA party who seeks to engage in an occupation or profession with one of the seven categories of business activities listed in Appendix 1603.A.1. The seven categories of business activities listed in Appendix 1603.A.1 represent a complete business cycle and include: (1) Research and Design; (2) Growth, Manufacture and Production; (3) Marketing; (4) Sales; (5) Distribution; (6) After-Sales Service; and (7) General Service.

Traders and investors are admitted to the United States under the E–1 and E–2 nonimmigrant categories, respectively [INA 101(a)(15)(E)].

A trader is an alien in the United States admitted solely to carry on trade of a substantial nature principally between the United States and the country of the alien's nationality. An investor is an alien who has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprises in the United States.

Intracompany transferees are admitted to the United States under the L–1 nonimmigrant classification [INA 101(a)(15)(L)]. An intracompany transferees is an alien who, within 3 years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for 1 year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary, and who seeks to enter the United States temporarily to render his or her services to a branch of the same employer or as parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Professionals under the NAFTA are admitted to the United States as TN nonimmigrant aliens [INA 214(e)].

What Is a TN Nonimmigrant Alien?

A TN nonimmigrant is a citizen of Canada or Mexico who seeks admission to the United States, under the provisions of Section D of Annex 1603 of the NAFTA, to engage in business activities at a professional level as provided for in such annex. The code ''TN'' is an admission code developed by the United States government for Canadian and Mexican citizens admitted to the United States as business professionals under the NAFTA. The TN code is not part of the NAFTA agreement and is not used by the Canadian and Mexican governments. The NAFTA parties have agreed that 63 occupations quality as professionals. These occupations are listed in the Appendix 1603.D.1 to Annex 1603 to the NAFTA found in § 214.6(c). The list represents the only professions that will enable an alien to obtain admission to the United States as a TN nonimmigrant alien.

What Changes Is the Service Proposing To Make in This Rule?

This rule proposes to add the occupation of actuary to the list of professions in Appendix 1603.D.1. In addition, this rule proposes to include plant pathologist to the Appendix 1603.D.1 as a footnote to the occupation of biologist. This rule also proposes to change the licensure requirements for Canadian TN aliens applying for admission to the United States. This provision is currently described at § 214.6(e)(3)(ii)(F). This rule also proposes to remove § 214.6(1), which relates to the transition period for Canadian citizens who were admitted to the United States under the United States-Canada Free Trade Agreement that existed before the effective date of the NAFTA. This rule also proposes to change all references to the Northern Service Center to the Nebraska Service Center to reflect the center's current name.

Why Is the Service Adding the Occupation of Actuary to Appendix 1603.D.1?

In June 1994, the American Academy of Actuaries and its Canadian and Mexican counterparts approached the United States Chapter 16 TEWG and requested that actuaries be added to the list of professions contained in Appendix 1603.D.1 to Annex 1603 to the NAFTA. After a series of negotiations and consultations, the NAFTA parties recognized that the occupation of actuary should be included in the list of professions in Appendix 1603.D.1. The parties agreed that the minimum educational requirements and alternative credentials for actuaries were a Baccalaureate or Licensiatura Degree in Actuarial Science or satisfaction of the necessary requirements to be recognized as an actuary by a professional actuarial association or society.

Why Is the Service Including the Occupation of Plant Pathologist in the Appendix 1603.D.1?

In 1990, the Canadian Phytopathological Society requested that the occupation of plant pathologist be added to the list of professions contained in Appendix 1603.D.1 to Annex 1603 to the NAFTA. The Society noted that most plant pathologists have either a Master's degree or a Ph.D. and are, therefore, professionals. After much negotiation and consultation, the Chapter 16 TEWG agreed that the occupation of plant pathologist should be included to the list of professions contained in the Appendix. This rule proposes to include the occupation of plant pathologist to the Appendix in § 214.6(c) as a footnote to the occupation of biologists. The NAFTA parties recognized that the occupation of plant pathologist should be referenced in the Appendix in the form of a footnote to the occupation of

biologist because the occupations are similar in educational requirements and duties.

What Is the Effect of Adding Actuaries to and Including Plant Pathologists on the Appendix 1603.D.1?

Including a footnote for plant pathologists and adding actuaries to the Appendix will make it easier for individuals employed in these professions in one NAFTA party to obtain admission to the territory of another NAFTA party. Since the addition and inclusion of these occupations facilitates the temporary entry of individuals employed in these professions, it comports with one of the general principles described in Article 1601 of the NAFTA.

Why Is the Service Proposing To Change the Licensure Requirements for Citizens of Canada Seeing Admission as a TN Alien?

The Service's current regulations, promulgated after the NAFTA went into effect in 1994, require the presentation of a license as a condition for admission of a Canadian TN to the United States.

To ensure that the Service's regulations implementing Chapter 16 are in conformity with the obligations of the United States under the agreement, this rule proposes to remove § 214.6(e)(3)(ii)(F) that requires the presentation of a license before a Canadian citizen can be admitted to the United States as a TN nonimmigrant alien.

However, Canadian TN nonimmigrant aliens will still be required to obtain the appropriate state license to practice their profession in the United States. The Statement of Administrative Action provides that, ''Nothing in NAFTA will permit Mexican or Canadian professionals to practice a licensed profession in the United States, even on a temporary basis, without meeting all applicable state licensing criteria and receiving such a license * * *.''

Does This Proposed Regulation Affect the Licensure Requirements for Mexican TN Aliens?

No, the Service is not proposing to remove the licensure requirement for Mexican TN nonimmigrant aliens described in § 214.6(d)(2)(iv). The NAFTA imposes several additional requirements on Mexican citizens seeking TN classification in the United States for a period of time not to exceed ten years (December 31, 2003), [See Annex 1603.D.5.of the NAFTA]. These requirements were described in section 341 of the U.S. Statement of Administrative Action that was presented to Congress at the time of enactment of the NAFTA Implementation Act [Pub. L. 103–182].

One of the additional requirements is that the entry of a citizen of Mexico, as a TN nonimmigrant, is subject to the petitioning requirements of section 214(c) of the Immigration and Nationality Act and the Service's implementing regulations found in § 214.2. Therefore, a U.S. employer seeking the services of a Mexican TN alien must file a Form I–129, Petition for Nonimmigrant Worker, with the required supporting documentation which includes any required state license. The Service is not proposing to remove the licensure requirement for Mexican citizens because the petition requirement remains in effect at this time.

What Is the Effect of Changing the Licensure Requirements?

This change will have no effect on the health and welfare of United States citizens who may be impacted by the alien's engaging in professional activities in the United States. In those jurisdictions where a particular profession or occupation requires licensure, State or Federal law will continue to require the alien's employer to insure that the alien has the proper license before the alien commences employment. In this regard a Canadian TN alien will be treated in the same fashion as a United States worker. While this rule will ensure that the Service will not require the alien to present the license to be admitted to the United States, the alien will still have to have a license to work in the United States consistent with Chapter 12 of the NAFTA.

It must be remembered that a TN alien is admitted into the United States for the purpose of engaging in business activities at a professional level. Like other aliens who fail to maintain the terms and conditions of their nonimmigrant status, a TN alien who fails to engage in activities at a professional level for the specified employer may be amenable to removal under section 237(a)(1) of the act, or ineligible for an extension of temporary stay under § 214 or a change of nonimmigrant status under section 248 of the Act.

The TN classification is not the appropriate classification for obtaining training or meeting professional licensure requirements in the United States. Such activities are consistent with the B–1 nonimmigrant classification. As noted earlier, the NAFTA provides for the admission of B–1 nonimmigrant aliens.

What Technical Changes Is the Service Making in This Rule?

This rule also proposes to remove § 214.6(1). That section discusses the transition period for Canadian citizens who were admitted to the United States under the former United States-Canada Free Trade Agreement (CFTA). The regulatory provision is no longer applicable because of the passage of time since the entry into force of the NAFTA that subsumed the CFTA.

In addition, this rule proposes to change all references to the ''Northern Service Center'' in the regulation to the ''Nebraska Service Center,'' the current name of the facility.

Finally, this rule proposes to remove the term ''diplomas, or certificates'' from the regulation at § 214.6(d)(2)(ii) and at § 214.6(e)(3)(ii) since these regulatory cites are inconsistent with footnote number 3 and 4 to the appendix. The footnotes clearly require that diplomas and certificates must be issued in Canada or Mexico, respectively. Therefore, diplomas and certificates received by an alien from another country would not establish the alien's eligibility for TN classification.

Does This Rule Have Any Impact on Any of the Service's Recently Published Interim or Proposed Rules?

This rule does not have any affect on the Service's recently published interim rules relating to certificates for health care workers or any regulation dealing with nonimmigrant aliens. This rule deals solely with the NAFTA.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. Although a small number of entities maybe affected by the changes proposed in this regulation, actuaries and plant pathologists affected by this rule will benefit by their ability to transfer to the United States and work in their chosen field in a more expeditious fashion.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions

of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget (OMB) has waived its review process under section 6(a)(3)(A).

Executive Order 13132

The regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Immigration and Naturalization Service has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

Paperwork Reduction Act

This proposed rule does not impose any new reporting or recordkeeping requirements. The information collection requirements contained in this rule were previously approved for use by the Office of Management and Budget (OMB). The OMB control numbers for this collection are contained in 8 CFR 299.5, Display of control numbers.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR Part 2.

2. Section 214.6 is amended by:

a. Adding the profession of ''Actuary'' immediately after ''Accountant'' to the appendix in paragraph (c);

b. Adding footnote 1a to the table of footnotes;

c. Revising the profession ''Biologist'' under the heading ''Scientist'' in the appendix to paragraph (c);

d. Revising the term ''Northern Service Center'' to ''Nebraska Service Center'' in paragraphs (d)(1) and (h)(1);

e. Removing the term ''diplomas, or certificates'' from paragraph (d)(2)(ii), third sentence;

f. Removing the term ''licenses,'' from paragraph (e)(3)(ii), introductory text, third sentence;

g. Removing the term ''diplomas, or certificates'' from paragraph (e)(3)(ii), introductory text, fourth sentence;

h. Adding the word ''and'' at the end of paragraph (e)(3)(ii)(D);

i. Removing the ''; and'' at the end of paragraph (e)(3)(ii)(E), and adding a period in its place;

j. Removing paragraph (e)(3)(ii)(F): and by

i. removing paragraph (1), to read as follows:

§ 214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level.

* * * * *

(c) * * *

Appendix 1603.D.1 (Annotated)

* * * * *

—Actuary-Baccalaureate or Licenciatura Degree in Actuarial Science; or satisfaction of the necessary requirements to be recognized as an actuary by a professional actuarial association or society.[1a]

* * * * *

—SCIENTIST

—Biologist (including Plant Pathologist)—Baccalaureate or Licenciatura Degree.

* * * * *

[1a] A professional actuarial association or society means a professional actuarial association or society operating in the territory of at least one of the Parties.

Dated: December 13, 2000.

Mary Ann Wyrsch,

Acting Commissioner, Immigration and Naturalization Service.

[FR Doc. 00–32281 Filed 12–18–00; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–321–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and EMB–145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–135 and EMB–145 series airplanes. This proposal would require replacement of the engine oil pressure sensors with new sensors, and installation of an oil tank pressure relief kit. Additionally, the proposal would require revision of the Airplane Flight Manual that would specify new oil pressure limits. This action is necessary to prevent rejected takeoffs due to exceeding engine oil pressure limits, which could result in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 18, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–321–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain ''Docket No. 2000–NM–321–AD'' in the

subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Linda M. Haynes, Aerospace Engineer, Airframe and Propulsion Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30337–2748; telephone (770) 703–6091; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NM–321–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–321–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports indicating that a high number of rejected takeoffs (RTO's) have occurred on certain EMBRAER Model EMB–145 series airplanes. We have been advised that Rolls-Royce Allison engines installed on Model EMB–145 series airplanes have been approved for operation with a transient oil pressure maximum limit of 155 pounds per square inch (psi) for up to two minutes. However, the current software configuration of the Engine Indicating and Crew Alerting System (EICAS) is not capable of displaying oil pressure limits that are above 145 psi. In addition, part of the airplane fleet is equipped with oil pressure indicators that do not show a maximum oil pressure limit or that show a ''maximum'' oil pressure limit below 115 psi. This condition, if not corrected, could result in a high number of RTO's and consequent reduced controllability of the airplane.

Similarity of Airplane Models

The oil pressure indicators on certain Model EMB–135 series airplanes are identical to those on the affected Model EMB–145 series airplanes. Therefore, those Model EMB–135 series airplanes may be subject to the same unsafe condition revealed on the Model EMB–145 series airplanes.

Explanation of Relevant Service Information

EMBRAER has issued Service Bulletin 145–31–0021, dated August 1, 2000, which describes procedures for replacing the oil pressure sensors with new oil pressure sensors. That service bulletin also references Rolls-Royce Service Bulletin AE 3007A–79–026, dated August 1, 2000, as an additional source of service information. In addition, EMBRAER Service Bulletin 145–31–0021 specifies concurrent accomplishment of procedures described in Rolls-Royce Service Bulletin AE 3007A–79–025, dated August 1, 2000. That Rolls-Royce service bulletin describes procedures for removing the pressurizing valve vent-tube [Part Number (P/N) 23065524], the oil tank pressurizing valve (P/N 23062185), and the oil tank-to-pressurizing valve vent-tube (P/N 23062186), and installing an oil tank pressure relief kit (P/N 23073557) and the oil tank pressurizing valve (P/N 23062185) in a new location.

The Departmento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil has issued Notice of Proposed Regulations—Brazilian airworthiness directives, NPR/AD–2000–145–05, dated August 23, 2000, and NPR/AD–2000–AE3007–01, dated August 24, 2000, proposing that the actions specified in the previously described service information be made mandatory.

EMBRAER has also issued Revision 40 of EMBRAER Model 145 Airplane Flight Manual, dated August 11, 2000, which specifies certain revised maximum oil pressure limits to 145 psi.

U.S. Type Certification of the Airplane

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in EMBRAER Service Bulletin 145–31–0021, dated August 1, 2000, and Rolls-Royce Service Bulletin AE 30007A–79–025, dated August 1, 2000. In addition, this proposed AD would require installation of Revision 40 into the Limitations Section of the FAA-Approved AFM.

Differences Between This Proposal and the Foreign Notices of Proposed Regulations

Operators should note that, although the Brazilian Notices of Proposed Regulations do not specify installation of Revision 40 into the AFM, the FAA has determined that this revision of the AFM is necessary to ensure that pilots are aware of the appropriate operational limits for the oil temperature. In addition, operators should note that, although 155 psi has been approved as the maximum limit for oil pressure,

Revision 40 of the AFM specifies the maximum limit for oil pressure as 145 psi. Therefore, for the purposes of this proposed AD, the operational limits for maximum oil pressure is 145 psi, as specified in Revision 40 of the AFM.

Interim Action

This is considered to be interim action. The manufacturer has advised that a new modification is currently being developed that will positively address the unsafe condition addressed by this AD. Once that modification is developed, approved, and available, the FAA may consider additional rulemaking.

Cost Impact

The FAA estimates that 185 EMBRAER Model EMB–135 and EMB–145 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to install the oil pressure sensor, and that the average labor rate is $60 per work hour. Required parts would cost approximately $3,562 per airplane. The FAA estimates that it would take approximately 2 work hours per airplane to install the oil tank pressure relief kit. Required parts would cost approximately $2,421 per airplane. Additionally, it would take approximately 1 work hour per airplane to accomplish the revision of the AFM. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $1,151,255, or $6,223 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ''ADDRESSES.''

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket 2000–NM–321–AD.

Applicability: Model EMB–135 and EMB–145 series airplanes, serial numbers 145001 through 145369 inclusive, equipped with Rolls-Royce/Allison engine Models AE 3007A, AE 3007A1/1, AE 3007A1/2, AE 3007A1/3, AE 3007A1, and AE 3007A1P, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent rejected takeoffs due to exceeding engine oil pressure limits, which could result in reduced controllability of the airplane, accomplish the following:

Required Actions

(a) Within 6 months after the effective date of this AD: Accomplish the requirements of paragraphs (a)(1) and (a)(2) of this AD concurrently.

(1) Replace the engine oil pressure sensors with new sensors, per EMBRAER Service Bulletin 145–31–0021, dated August 1, 2000.

(2) Install an oil tank pressure relief kit per Rolls-Royce Service Bulletin AE 3007A–79–025, dated August 1, 2000.

(b) After completion of the actions required by paragraphs (a)(1) and (a)(2) of this AD and before further flight: Revise the Limitations Section of the FAA-approved Airplane Flight Manual (AFM) by inserting a copy of Revision 40 of the EMBRAER Model–145 AFM, dated August 11, 2000, into the AFM.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Manager, Atlanta ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Note 3: The subject of this AD is addressed in Brazilian Notice of Proposed Regulations NPR/AD–2000–145–05, dated August 23, 2000, and NPR/AD–2000–AE3007–01, dated August 24, 2000.

Issued in Renton, Washington, on December 13, 2000.

Dorenda D. Baker,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–32316 Filed 12–18–00; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3195, 3196

[NM091–9971–EK–HE16]

RIN 1004–AD35

Federal Helium Program Regulations and Public Meetings

AGENCY: Bureau of Land Management, Interior.

ACTION: Advance Notice of Proposed Rule Making and Public Meetings.

SUMMARY: The Bureau of Land Management (BLM) requests comments and suggestions to assist in the writing of its regulations governing the Federal Helium Program. The rule would establish regulations for crude helium sales, helium pipeline and storage operations, helium reporting, and gas analyses to determine helium content. The rule would also revise and extend existing regulations for helium on Federal lands and for in-kind crude helium sales. The rule would help to manage the Federal Helium Program and to fulfill the requirements of the Helium Privatization Act of 1996. We encourage members of the public to participate in public meetings and to provide comments and suggestions to help to clearly define the requirements for the Federal Helium Program. Your help is specifically requested to identify and to offer comments and suggestions about conflicts between helium processes and procedures and those of other fluid minerals. We also ask you to request to be placed on BLM's mailing list if you wish to receive additional information.

DATES: We will accept comments and suggestions on the advance notice of proposed rule making until 5:00 p.m., Eastern Time on March 26, 2001. See the **SUPPLEMENTARY INFORMATION** section for the dates of the public meetings.

ADDRESSES: Commenters may mail written comments to the Bureau of Land Management, Administrative Record, Room 401LS, 1849 C Street, NW, Washington, DC 20240; or hand-deliver written comments to the Bureau of Land Management, Administrative Record, Room 401, 1620 L Street, NW, Washington, DC 20036. See **SUPPLEMENTARY INFORMATION** for the electronic access and filing address. Comments will be available for public review at the L Street address from 7:45 a.m. to 4:15 p.m., Eastern Time, Monday through Friday, except Federal holidays. Comments will also be available for public review at 801 South Fillmore, Suite 500, Amarillo, Texas, from 7:30 a.m. to 4 p.m., Central Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: You may contact Jeanne McCubbin, at (806) 324–2655, Connie Neely, (806) 324–2635, or Shirlean Beshir, (202) 452–5033. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the above individuals.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

Your written comments should:

- Be specific;
- Explain the reason for your comments and suggestions;
- Be about the issues outlined in this notice; and
- Where possible, reference the specific section or paragraph of existing regulations which you are addressing.

The comments and recommendations, which are most useful and likely to influence decisions on the content of the proposed rule, are:

- Comments and recommendations supported by quantitative information or studies, and
- Comments which include citations to and analyses of the applicable laws and regulations.

We are particularly interested in receiving comments and suggestions about the topics listed under section III. Description of Information Requested.

Electronic Access and Filing Address

Commenters may transmit comments electronically via the Internet to *WOComment@blm.gov.* Please submit comments as an ASCII file and avoid the use of special characters or encryption. Please include ''ATTN: AD35'' and your name and address in your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (202) 452–5030.

Public Meetings

The following topics will be covered at each public meeting: (1) Helium on Federal lands; (2) pipeline and storage facility operation and maintenance; (3) crude helium sales; (4) reporting and data collection; and (5) gas analyses to determine helium content.

We will conduct public meetings on the following dates at the specified locations and times:

- Amarillo Field Office, BLM, 801 S. Fillmore, Room 447, Amarillo, Texas, on January 8, 2001, from 6:30 p.m. to 8:30 p.m.
- Houston, Texas, Crowne Plaza (near Gallaria), 2222 W. Loop South, on January 10, 2001, from 6:30 p.m. to 8:30 p.m.
- Portland, Oregon, Doubletree Lloyd Center, 1000 NE., Multnomah, on January 17, 2001, from 6:30 p.m. to 8:30 p.m.
- Aurora, CO (Denver area south of airport), Marriott, 16455 E. 40th Circle, on January 23, 2001, from 6:30 p.m. to 8:30 p.m.'
- Washington, DC, Capital Hilton, 16th & K Street, NW, on January 25, 2001, from 4 p.m. to 6 p.m.

The sites for the public meetings are accessible to individuals with physical impairments. If you need a special accommodation to participate in one or all of the meetings (*e.g.,* interpreting service, assistive listening device, or materials in alternative format), please notify the contact person listed in this notice no later than two weeks prior to the scheduled meeting. Although we will attempt to meet a request received, the requested accommodation may not be available.

The meetings will be recorded by a stenographer and will become part of the formal Federal helium regulation record. If you plan to present a statement at the meetings, we will ask you to sign in before the meeting starts and to clearly identify yourself for the record. Your speaking time at the meeting(s) will be determined before the meeting(s), based upon the number of persons wishing to speak and the approximate time available for the session. You will be provided at least five minutes to speak.

If you do not wish to speak at the meetings but you have views, questions, and concerns about regulations for the Federal Helium Program, you may submit written statements for inclusion in the public record at the meeting. You may also submit written comments and suggestions regardless of whether you attend or speak at a public meeting. See the **ADDRESSES** section of this notice for the procedures.

II. Background

The Federal Helium Program has undergone many changes since its inception in 1925. Its original purpose was to ensure supplies of helium to the Federal Government for defense, research, and medical purposes. With time, the program evolved into a conservation program with a primary goal of supplying the Federal Government with high-grade helium for high-tech research and aerospace purposes. The most recent adaptation of the program was through the Helium Privatization Act of 1996, which redefined the primary functions as:

- Operating and maintaining a helium storage reservoir and pipeline system;
- Providing crude helium gas by contract with private companies;
- Evaluating the Nation's helium-bearing gas fields; and
- Providing responsible access to Federal land for managed recovery and disposal of helium.

III. Description of Information Requested

We are committed to carrying out the provisions of the Helium Privatization Act of 1996 (50 U.S.C. 167). Topics we are considering for the proposed regulations include, but are not limited to the following:

Helium on Federal Lands: We will enter negotiated agreements with private parties for the recovery and disposal of helium produced from Federal leaseholds. The agreements will primarily be with:

(1) Existing gas processing plants which extract and sell Federal helium;

(2) Parties building plants with helium extraction capability.

We want commenters to clarify topics on the processes and procedures which would enable economic helium production, extraction, and sales.

We will also strive to establish regulations to facilitate coexistence of the Federal Helium Program with that of the Federal Oil and Gas Program. We seek comments about the following:

• *Method of determining Federal ownership percentage of helium produced from secondary unit areas containing Federal helium.* Can the process used for Federal leaseholds (based upon acreage and mineral ownership) be used for secondary units?

• *Allowable production losses.* Is it reasonable to allow an 8 percent loss of helium from the wellhead to the point of sale before seeking compensation?

• *Helium drainage protection.* Can we use a method similar to the one used to protect oil and gas to protect helium?

• *Bonding for payment default and reclamation.* Should we require a separate bond to cover helium production? Should we allow operators to transfer oil and gas bonds to provide bond coverage for helium?

• *Plugged oil and gas wells.* Is there a way to encourage and enable economic helium production and extraction when oil and gas wells are plugged or targeted for plugging?

• *Incentives.* What incentives should we establish to encourage helium production from gas streams in close proximity to extraction plants or in areas with low British Thermal Unit (BTU) gas content?

Crude Helium Sales: We would like to receive comments and suggestions about the existing regulations for in-kind crude helium sales (43 CFR 3195). In addition, we request your questions, concerns, comments, and recommendations of ways to meet the requirements for disposition of the Federal crude helium in storage (stockpile) (50 U.S.C. 167).

Reporting and Data Collection: We would like to receive comments and suggestions about the helium data collection and reporting processes. Specifically, we seek comments and suggestions about the following:

• Is there a way for the oil and gas industry to include helium in their standard gas analysis process to enable better data collection of helium content of gas fields?

• What are the best ways for BLM to determine and confirm the location and amounts of helium resources outside the United States?

Gas Analyses to Determine Helium Content: We seek comments about the following:

• Would it be feasible for BLM to send a helium sample to your company lab or company contract lab for analysis and report the helium results? The lab analysis data would be compared to BLM's analysis.

• Could members of the oil and gas industry send replicate gas stream samples to the BLM laboratory, if requested?

Additional information about the Federal Helium Program is available on the Internet at *Helium—Regulations@nm.blm.gov.*

Dated: December 12, 2000.

Sylvia V. Baca,

Assistant Secretary, Land and Minerals Management.

[FR Doc. 00–32291 Filed 12–14–00; 3:47 pm]

BILLING CODE 4310–84–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 00–2771; MM Docket No. 00–245; RM–9971]

Radio Broadcasting Services; Alberta, VA and Whitakers, NC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Broomfield Broadcasting, Inc. requesting the substitution of Channel 276C3 for Channel 276A at Alberta, Virginia and the reallotment of Channel 276C3 to Whitakers, North Carolina as the community's first local aural transmission service. The allotment Channel 299A to Alberta as a replacement for Channel 276C3 from Alberta. Channel 276C3 can be allotted to Whitakers in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 299A can be allotted to Alberta in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for Channel 276C3 at Whitakers are 36–11–23 North Latitude and 77–51–09 West Longitude. The coordinates for Channel 299A at Alberta are 36–51–56 North Latitude and 77–53–12 West Longitude.

DATES: Comments must be filed on or before January 29, 2001 and reply comments on or before February 13, 2001.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows, John C. Trent, Esq., Putbrese, Hunsaker & Trent, P.C., 100 Carpenter Drive, Suite 100, P.O. Box 217, Sterling, VA 20167–0217 (Counsel for Broomfield Broadcasting, Inc., petitioner).

FOR FURTHER INFORMATION CONTACT: Arthur D. Scrutchins, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 00–245; adopted November 29, 2000 and released December 8, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 00–32244 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 001025296-0296-01; I.D. 072600A]

RIN 0648-AO05

Endangered and Threatened Species: Proposed Range Extension for Endangered Steelhead in Southern California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: In August 1997, NMFS listed the Southern California steelhead Evolutionarily Significant Unit (ESU) as an endangered species and defined its southern limit as Malibu Creek in Los Angeles County, California, based on the best information available at that time. In February 2000, NMFS designated critical habitat for this ESU that includes all accessible and occupied waterways, including the adjacent riparian zone, below longstanding impassable natural barriers within the range of the ESU.

There is now new information indicating that steelhead or their progeny now occur in at least two coastal river basins south of Malibu Creek, and have successfully spawned in one of these basins (San Mateo Creek). Based on this new information, NMFS is now issuing a proposed rule under the Endangered Species Act (ESA) to extend the current range of this endangered ESU to San Mateo Creek in northern San Diego County, California.

Within the redefined Southern California steelhead ESU, only naturally spawned populations of steelhead, and their progeny, which reside below naturally occurring and man-made impassable barriers (e.g., impassable waterfalls and dams) are proposed for listing. At this time, NMFS is proposing to list only the anadromous life forms of *Onchorynchus mykiss (O. mykiss)* in those river basins south of Malibu Creek.

DATES: Comments must be received by February 20, 2001. Requests for public hearings must be received by February 2, 2001.

ADDRESSES: Comments on this proposed rule and requests for public hearings or reference materials should be sent to the Assistant Regional Administrator, Protected Resources Division, NMFS, Southwest Region, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

FOR FURTHER INFORMATION CONTACT: Craig Wingert, 562-980-4021, or Chris Mobley, 301-713-1401.

SUPPLEMENTARY INFORMATION:

Previous Federal ESA Actions Related to the Southern California Steelhead ESU

In 1994, NMFS received a petition from the Oregon Natural Resources Council and 15 co-petitioners to list west coast steelhead populations under the ESA. In response to this petition, NMFS conducted a status review of west coast steelhead (Busby *et al.*, 1996). Based on the results of this status review and other information which constituted the best scientific and commercial data available, NMFS published a proposed listing determination on August 9, 1996, that identified 15 ESUs of steelhead distributed throughout the states of Washington, Oregon, Idaho, and California, including the Southern California ESU (61 FR 41541). Ten of the ESUs were proposed for listing as threatened or endangered species in that document, including the Southern California steelhead ESU which was proposed for listing as an endangered species. On August 18, 1997, NMFS published a final rule listing five steelhead ESUs as threatened or endangered under the ESA (62 FR 43937). The Southern California steelhead ESU was listed as an endangered species in that final rule.

On February 5, 1999, NMFS published a proposed critical habitat designation for nineteen ESUs of threatened and endangered salmon and steelhead distributed throughout Washington, Oregon, Idaho, and California (64 FR 5740), including the endangered Southern California steelhead ESU. A final rule designating critical habitat for these 19 ESUs, including the Southern California steelhead ESU, was published on February 16, 2000 (65 FR 7764).

New Information Concerning Steelhead Distribution and Habitat Use South of Malibu Creek in Southern California

In the proposed listing determination for the Southern California steelhead ESU (61 FR 41541), NMFS indicated that the current range of the ESU extended to the southernmost extent of the species range which was thought to be Malibu Creek in Los Angeles County based on the best available information. Many comments were received regarding this issue during the public comment period, with most indicating that the southern boundary of the ESU should be extended further south to either the southern extent of the species historical range, the Mexican border, or some other location. NMFS reviewed the available references to steelhead occurring historically and more recently in streams south of Malibu Creek and concluded in its final listing determination that there was insufficient information to revise the southern boundary of this ESU even though some information indicated that steelhead might occasionally occur as far south as the Santa Margarita River in San Diego County (62 FR 43937).

The San Mateo Creek watershed arises in the Cleveland National Forest and flows in a southwesterly direction to the Pacific Ocean just south of San Clemente in northern San Diego County. It is located approximately 100 miles (161.3 kilometers (km)) south of Malibu Creek which NMFS identified in 1997 as the southern extent of the species range and, therefore, the southern boundary of the Southern California steelhead ESU. Much of the lower reach of San Mateo Creek flows through the Camp Pendleton Marine Corps Base. Approximately 6-7 miles (9.7-11.3 km) are accessible to steelhead in the mainstem and tributaries. According to information in Titus *et al.* (in press), Woelfel (1991), and the California Department of Fish and Game (DFG) (DFG, 2000), San Mateo Creek was an important steelhead-producing stream prior to 1950 and evidently supported a local sport fishery of both juveniles and adults. More recently, however, Nehlsen *et al.* (1991) classified the San Mateo Creek steelhead population as extinct.

In February 1999, an angler reported catching and releasing a juvenile steelhead/rainbow trout (*O. mykiss*) in the lower reach of San Mateo Creek. Based on this report, DFG initiated a field investigation to confirm the presence of *O. mykiss* in the San Mateo Creek watershed. The results of this investigation are presented in a February 2000 report prepared by DFG entitled: ''Steelhead Rainbow Trout in San Mateo Creek, San Diego County, California''(DFG, 2000), and are summarized here.

Between March 3 and September 3, 1999, a total of 78 juvenile *O. mykiss* were observed by DFG and other personnel in the San Mateo Creek watershed, with the majority of these observations occurring in the mainstem near its confluence with Devil Canyon. DFG did not employ depletion or mark-recapture methods in its surveys; thus, population size could not be estimated.

In conjunction with the field investigation, DFG also collected biological information and samples for subsequent analysis, including fin clip tissue samples from two fish for mitochondrial DNA analysis, one otolith sample for micro chemical analysis of its primordium to determine the marine versus freshwater residency of the maternal parent, and scale samples and length measurements to estimate age and growth.

Analysis of the scale samples and associated length data indicated that the juvenile *O. mykiss* observed in 1999 were age 2+ fish that constituted a relatively homogenous population in terms of size (164-245 millimeters (mm) total length). Based on the age of these fish, DFG concluded that they were progeny of adults that spawned in 1997. Micro chemical analysis of strontium/calcium (Sr/Ca) ratios in the single otolith sample obtained from a fish that was sacrificed produced a Sr/Ca profile characteristic of a fish having an anadromous maternal parent (i.e. a steelhead parent). Given the homogenous nature of the observed juvenile population in terms of age and length, DFG concluded that the juvenile *O. mykiss* observed in 1999 were the progeny of at least one maternal parent that was anadromous and that spawned somewhere in the San Mateo Creek watershed in 1997. Finally, genetic analysis of tissue samples from two fish demonstrated that both carried the mtDNA haplotype (MYS5) which is found most commonly in southern California steelhead (Nielson, 1994 and 1996; Nielson *et al.*, 1994a and 1994b). Since this haplotype is primarily found in southern California steelhead populations and it has not been found in any hatchery populations of steelhead or domestic trout in California, the juvenile *O. mykiss* population found in San Mateo Creek in 1999 appears to have close genetic affinities with native southern California steelhead, and is not the result of domestic trout planting.

In late May 2000, DFG conducted a follow up survey for steelhead in the upper portion of San Mateo Creek just above the gauging station on Camp Pendleton, including the lower reach of the tributary Devils Canyon Creek. This survey was conducted in conjunction with biologists from NMFS and the U.S. Fish and Wildlife Service (FWS). The limited survey effort observed three adult (approximately 8-12 inches or 200-300 mm in total length) *O. mykiss* in the mainstem pools and approximately 15-20 juveniles (60-65 mm in total length) in Devils Canyon Creek. DFG biologists speculate that the larger size class of *O. mykiss* may be holdover fish from the steelhead population found in 1999, whereas the smaller juveniles may be the progeny of these holdover fish.

Based on this new information, NMFS believes that reconsideration of the geographic range and critical habitat for the Southern California steelhead ESU is warranted.

Southern California Steelhead ESU Revision

To qualify for listing as a threatened or endangered species, identified populations of steelhead must be considered a ''species'' under the ESA. The ESA defines ''species'' to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' NMFS published a policy (56 FR 58612, November 20, 1991) describing how the agency would apply the ESA definition of ''species'' to anadromous salmonid species. This policy provides that a salmonid population will be considered distinct, and hence a species under the ESA, if it represents an ESU of the biological species. A population must satisfy two criteria to be considered an ESU: (1) It must be reproductively isolated from other conspecific population units; and (2) it must represent an important component in the evolutionary legacy of the biological species. The first criterion, reproductive isolation, need not be absolute, but must be strong enough to permit evolutionarily important differences to accrue in different population units. The second criterion is met if the population contributes substantially to the ecological/genetic diversity of the species as a whole. Guidance on the application of this policy is contained in Waples (1991). The genetic, ecological, and life history characteristics that NMFS assessed to identify the number and geographic extent of steelhead ESUs on the west coast in accordance with this policy, including the Southern California steelhead ESU, are discussed in detail in Busby *et al.* (1996) and in the August 9, 1996, proposed listing determination for west coast steelhead (61 FR 41541).

The Southern California steelhead ESU, as currently defined, is described in previous **Federal Register** documents (61 FR 41541 and 62 FR 43937) based on data collected and analyzed by NMFS and summarized in the 1996 west coast steelhead status review (Busby *et al.*, 1996) and a subsequent status review update (NMFS, 1997). As described in the August 18, 1997, final listing determination (62 FR 43937), the Southern California ESU consists of all naturally spawned populations of steelhead (*O. mykiss*), and their progeny, which occupy rivers and streams from the Santa Maria River in San Luis Obispo County, California (inclusive) to the southern extent of the species' range which was identified as Malibu Creek in Los Angeles County, California (inclusive).

In the 1996 proposed listing determination for the Southern California steelhead ESU (61 FR 41541), NMFS concluded that the current range of the ESU extended to the southernmost extent of the species range which was thought to be Malibu Creek in Los Angeles County. However, NMFS also acknowledged that there were reports of steelhead in some coastal streams as far south as the Santa Margarita River in San Diego County (Hubbs, 1946; Barnhart, 1986; Higgins, 1991; McEwan and Jackson, 1996; and Titus *et al.*, in press), and, therefore, indicated that the distribution and abundance of steelhead south of Malibu Creek were unresolved issues regarding this ESU. NMFS received many comments regarding this issue during the public comment period, with most indicating that the southern boundary of the ESU should be extended further south to either the historical range of the species, the U.S.- Mexico border, or some other location. NMFS reviewed the available references to steelhead occurring historically and more recently in streams south of Malibu Creek and concluded in the 1997 final listing determination for this ESU that there was insufficient information to revise the southern boundary of this ESU south of Malibu Creek even though some limited anecdotal information suggested steelhead may occasionally occur as far south as the Santa Margarita River (62 FR 43937).

The recent information compiled by DFG (DFG, 2000) is limited, but still suggests that adult steelhead entered San Mateo Creek and successfully spawned in 1997. The juvenile progeny of those spawning adults were observed by DFG during its field investigations in the spring and summer of 1999. More recent information from May 2000 suggests that steelhead still occupy portions of San Mateo Creek and may have successfully spawned again since 1997. The limited genetic information suggests that the juvenile steelhead found in 1999 have close genetic affinities to native southern California steelhead and are not the result of domestic trout planting. Since there is no evidence of a resident trout population or recent evidence of

steelhead presence in San Mateo Creek (DFG, 2000; Titus *et al.*, in press; Lang *et al.*, 1998), it is likely that the adult steelhead which successfully spawned in 1997 were strays from another watershed elsewhere in the Southern California steelhead ESU. Based on a review of this new information, NMFS now proposes that the San Mateo Creek steelhead population be considered part of the Southern California steelhead ESU.

The Malibu Creek and San Mateo Creek watersheds are separated by approximately 100 miles (161.3 km). Therefore, inclusion of the San Mateo Creek steelhead population in the Southern California ESU raises the question of whether or not steelhead occur or are present in any other watersheds located between Malibu Creek and San Mateo Creek. Based on information reported by Titus *et al.* (in press), steelhead were historically reported in several watersheds between Malibu Creek and San Mateo Creek (i.e., Los Angeles River, San Gabriel River, Santa Ana River, and San Juan Creek), but are now extinct as a result of major habitat modification or habitat blockage associated with flood control, urban development, and other factors. Given the existing habitat conditions in these highly modified river systems, NMFS does not believe they are currently suitable for steelhead utilization, and, therefore, are highly unlikely to support steelhead absent major restoration efforts.

Information regarding the current presence of steelhead in other streams between Malibu Creek and San Mateo Creek is lacking with the exception of a recent observation of fish in Topanga Creek which is approximately 4 miles (6.5 km) south of Malibu Creek. Titus *et al.*, (in press) indicated that *O. mykiss* were observed in Topanga Creek in 1979 and in the early 1990s. In April 2000, an adult *O. mykiss* was reported in Topanga Creek. A NMFS' biologist conducted a site visit and confirmed the presence and identification of two *O. mykiss* ranging from 14-20 inches (359-573 mm) in total length. Both fish were observed in a relatively deep pool (4 ft (1.2 meters (m)) deep) located about 1 mile (1.7 km) upstream of the confluence with the ocean. Based on the existing habitat conditions and the size of the fish, it is unlikely that they spent their entire life cycle in Topanga Creek. Since there is no evidence of any stocking of rainbow trout in Topanga Creek, it is most likely that these fish originated from some other stream within the ESU. The nearest streams known to support steelhead are Malibu Creek and Arroyo Sequit, both of which are located only a few miles north of Topanga Creek.

Although steelhead historically occurred further south than San Mateo Creek, there is no evidence that they do so any longer and are considered extinct throughout San Diego County by Titus *et al.*, (in press). As with most streams south of Malibu Creek, significant habitat modification has occurred due to urbanization and other factors which have blocked steelhead access to historical spawning and rearing habitat and degraded the remaining habitat. Although there is no information documenting the presence of steelhead south of San Mateo Creek, suitable habitat for steelhead is thought to exist in San Onofre Creek which is located on Camp Pendleton just south of San Mateo Creek (Lang *et al.*, 1998)

Status of Southern California Steelhead ESU

The Southern California steelhead ESU was listed as an endangered species under the ESA in 1997 (62 FR 43937). The biological status of this ESU was described in the final rule based on the results of NMFS' west coast steelhead status review (Busby *et al.*, 1996) and in an updated status review (NMFS, 1997), which concluded that this ESU was at a high risk of extinction.

Historically, steelhead naturally occurred south into Baja California. Titus *et al.*, (in press), as cited in the final listing determination, concluded that all steelhead populations south of Malibu Creek in Los Angeles County were extinct based on the available information. Estimates of pre-1960s abundance for several rivers in this ESU (i.e. Santa Ynez, Ventura, Santa Clara, Malibu Creek) suggest that individual steelhead populations numbered in the thousands of individuals. Published abundance estimates for the Ventura and Santa Clara Rivers, for example, ranged from 4,000-6,000 and 7,000-9,000 fish, respectively. At the time of NMFS' final listing determination, the total run size for several streams in the ESU (e.g., Santa Ynez, Ventura River, Santa Clara River, Malibu Creek) was estimated to number fewer than 200 individuals each (Titus *et al.*, in press). Recent information regarding steelhead abundance for the Santa Ynez, Ventura, and Santa Clara Rivers suggests that the abundance estimates made at the time of the final listing determination were probably high.

NMFS' primary concerns about this steelhead ESU at the time of its listing in 1997, were the widespread and dramatic declines in abundance relative to historical levels and the major reduction in the species range. Given the extremely low abundance estimates and the associated risk associated with demographic and genetic variability in small populations, the long-term persistence of sustainability of this ESU in the future was a critical concern. In addition, NMFS was concerned that the restricted spatial distribution of the remaining populations placed the ESU as a whole at risk because of reduced opportunities for re-colonization of streams suffering local population extinctions. NMFS concluded that the principal factors responsible for the decline of steelhead populations within this ESU were water diversions and extraction, habitat blockages and degradation, agricultural activities, and urbanization. Little new information regarding the abundance of steelhead in this ESU has been collected since NMFS' final listing determination in 1997, with the exception of limited data collected as a result of monitoring efforts in the Santa Ynez and Santa Clara Rivers. These data are not comprehensive enough to estimate population sizes, but they do indicate that these steelhead populations continue to be very small.

As discussed earlier in this document, NMFS has concluded that the San Mateo Creek steelhead population should be considered part of the Southern California ESU based on the available information. Based on the information compiled by DFG, the steelhead population found in San Mateo Creek during 1999 appears to be very small and was likely produced by a limited number of adults that strayed into the watershed and spawned in 1997. Given the small number of steelhead found in San Mateo Creek, the apparent extirpation of steelhead from virtually all other streams between Malibu Creek and San Mateo Creek with the exception of Topanga Creek, and the extremely low abundance estimates for all other populations within the ESU, NMFS concludes that the proposed redefined Southern California steelhead ESU continues to be at a high risk of extinction.

Summary of Factors Affecting the Species

Section 4(a)(1) of the ESA and NMFS' implementing regulations (50 CFR part 424) set forth procedures for listing species. The Secretary of Commerce (Secretary) must determine, through the regulatory process, if a species is endangered or threatened based upon any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial,

recreational, scientific, or education purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence.

In conjunction with its proposed listing determination for west coast steelhead ESUs in 1996, NMFS prepared a report summarizing the factors leading to the decline of west coast steelhead, including the Southern California steelhead ESU. This report was entitled: ''Factors for Decline: A supplement to the notice of determination for west coast steelhead'' (NMFS, 1996). This report concluded that all of the factors identified in section 4(a)(1) of the ESA have played a role in the decline of west coast steelhead ESUs. The report specifically identified destruction and modification of habitat, overutilization for recreational purposes, and natural and human-made factors as being the primary causes for the decline of steelhead on the west coast.

NMFS (1996) identified several specific factors that contributed to the decline of steelhead populations in the ESU as it was defined in the proposed and final listing determinations, including: habitat blockages, water diversion and extraction, urbanization, agriculture, and recreational harvest. McEwan and Jackson, 1996; and Titus *et al.*,(in press) also cited extensive loss of habitat due to water development, impassible dams, and dewatering of portions of rivers as the principal reasons for the decline of steelhead in this ESU. Habitat problems resulting from water development include inadequate flows, flow fluctuations, blockages (partial and full), and entrainment (McEwan and Jackson, 1996). These factors for decline are discussed in more detail in NMFS (1996), McEwan and Jackson (1996), and in NMFS' 1997 final listing determination (62 FR 43937). Although NMFS has been working to address impacts to the Southern California steelhead ESU through sections 7 and 10 of the ESA since it was listed in 1997, these same factors continue to adversely affect the small steelhead populations which persist in the watersheds ranging from the Santa Maria River southward to Malibu Creek. Because NMFS has concluded that the Southern California steelhead ESU range should be extended to San Mateo Creek, the following discussion focuses only on those factors affecting steelhead within the geographic range extending from Malibu Creek southward to San Mateo Creek (inclusive).

1. The Present or Threatened Destruction, Modification, or Curtailment of Steelhead Habitat or Range

With the exception of the recent steelhead observations in San Mateo Creek and Topanga Creek, steelhead populations south of Malibu Creek are thought to be extirpated due to habitat destruction or blockages associated with urbanization and flood control (Titus *et al.*, in press), although extensive monitoring has not been conducted to assess their presence. For example, steelhead access and use of the Los Angeles River is currently precluded by the presence of flood control structures throughout much of its lower reach such as the concrete lining of the river channel and the dam at the Sepulveda Flood Control Basin. The lower reaches of the San Gabriel River are highly urbanized with the channel modified for flood control, and the river is impounded further upstream. The Santa Ana River is similarly modified for flood control and flows largely consist of effluent from water treatment plants except in the rainy season. Because of these limited flows and restricted releases from Prado Dam, fish habitat is limited in the lower Santa Ana River. San Juan Creek, a much smaller stream in southern Orange County, is also channelized for flood control in its lower reach (approximately 2-3 miles (3.2-4.8 km)) and other potential barriers to upstream movement also exist.

San Mateo Creek was once an important production area for steelhead in San Diego County (Nehlsen *et al.*, 1991; DFG, 2000). As summarized in Titus *et al.*, (in press), steelhead appear to have been most abundant in the San Mateo Creek watershed prior to 1950. After 1950, there are many fewer observations of steelhead and none after the early 1980s until juveniles were found there in 1999. For example, Woelfel (1991) found no juvenile steelhead or rainbow trout in San Mateo Creek during surveys in 1987-88. Similarly, Lang *et al.*, (1998) failed to observe or capture any steelhead during surveys in 1995, 1996, and 1997. The steelhead population in San Mateo Creek was probably reduced by natural episodes of sediment input from within the watershed. However, increased groundwater extraction in the lower creek area since the mid-1940s is also thought to be responsible, both directly and indirectly, for the inability of steelhead to use the system as they historically did (DFG, 2000; Titus *et al.*, in press; Lang *et al.*, 1998). Riparian vegetation has been lost, stream channel width has increased, and surficial flow has been reduced or eliminated during most of the year. Accordingly, the migration corridor for immigrating adult and emigrating juvenile steelhead has become very unreliable. Human-caused fires farther upstream have also resulted in large sediment input that has filled pools and contributed sediment to the lagoon at the river mouth, both of which are important rearing habitat for juvenile steelhead. Despite less than optimal conditions in the lower river which are not always conducive to adult or juvenile passage, Lang *et al.*, (1998) and DFG (2000) have identified upstream spawning and rearing habitat which can be used by steelhead when sufficient flows allow adult passage.

2. Overutilization for Commercial, Recreational, Scientific, or Education Purposes

NMFS' review of factors affecting west coast steelhead concluded that harvest was a factor contributing to the decline of the Southern California steelhead ESU (NMFS, 1996). According to McEwan and Jackson (1996), steelhead in most streams in Santa Barbara, Ventura, and Los Angeles Counties were until the early 1990s subject to the most liberal angling regulations anywhere in the State of California. Most streams in southern California were regulated by the general regulations of the Southern Sport Fishing District (which includes Santa Barbara, Ventura, Los Angeles, Orange, and San Diego counties) which allowed fishing year-round with a five-fish daily bag limit. The only streams with special protective regulations were the Ventura River and Malibu Creek.

Because steelhead populations in southern California had declined to such critically low population levels by the early 1990s, the California Fish and Game Commission adopted more restrictive angling regulations for some streams (Santa Ynez River, Ventura River, Santa Clara River, and Gaviota Creek) in 1994. These more stringent regulations included: (1) a reduction in the fishing season from year round to the Saturday before Memorial Day through December 31; (2) a zero bag limit; and (3) a requirement that anglers use artificial lures with barbless hooks. In 1996, these same regulations were adopted by the Commission for the anadromous reaches of all coastal streams in southern California. Within the coastal area extending south of Malibu Creek to San Mateo Creek, these same regulations are now in effect for the following streams: Topanga Creek, San Juan Creek, and San Mateo Creek. Given the extremely low numbers of juvenile steelhead that were found in

San Mateo Creek, and the possible sporadic occurrence of small numbers of steelhead in other streams (e.g., Topanga Creek), recreational angling may continue to be a risk to steelhead in at least some portions of the redefined Southern California steelhead ESU.

3. Disease or Predation

Introductions of non-native species and habitat modifications have resulted in increased predator populations in numerous west coast river systems, thereby increasing the level of predation experienced by steelhead and other salmonids (NMFS, 1996). Exotic fish species that are potential predators of steelhead are known to occur in San Mateo Creek and other watersheds (San Onofre Creek, Santa Margarita River) on Camp Pendleton (Lang *et al*., 1998). According to Lang *et al*., (1998) brown bullhead dominated the fish assemblage in San Mateo Creek, with both adults and juveniles observed in perennial pools. Other species observed in the San Mateo Creek watershed included, mosquito fish, adult and juvenile green sunfish, bluegill and largemouth bass. One Channel catfish, which is a known predator of steelhead, was found dead in the upper San Mateo Creek in a portion of the Cleveland National Forest (Lang *et al*., 1998). Brown trout have been stocked in San Mateo Creek (last time in the mid 1980s), but they were not observed during the most recent surveys (Lang *et al*., 1998).

Mosquito fish were introduced for mosquito abatement and are found in most Camp Pendleton waters. This species has taken over the niche of the native three-spined stickleback which is often an important prey item for salmonids; thus it could possibly serve as a prey item for steelhead in San Mateo Creek. Green sunfish dominated the San Mateo Creek lagoon in the late 1980s and early 1990's according to Swift (1994) and were the only fish found in perennial pools in the upper watershed and Devil Canyon in the late 1980's, suggesting that they may have displaced residual steelhead during the drought period (Woelfel, 1991). In other California streams (i.e., Malibu Creek and Carmel River) green sunfish were found to prey on juvenile trout (Swift, 1975; Greenwood, 1988; cited in Woelfel, 1991), and in San Clemente Reservoir on the Carmel River, green sunfish outcompeted trout for benthic food (Greenwood, 1988).

The control of exotic fish species in the San Mateo Creek watershed, both on Camp Pendleton and in Cleveland National Forest, is considered critical to restoring steelhead to that watershed (DFG, 2000; Lang *et al.*, 1998). Lang *et al.*, (1998) recommend implementation of measures to contain exotic fish species in small lakes and ponds where recreational fishing occurs, in conjunction with efforts to control in-river propagation of exotics using Rotenone, electro-shocking, seining, or other means in perennial pools during summer low flows.

4. Inadequacy of Existing Regulatory Mechanisms

Virtually all of the San Mateo Creek watershed is located on Federal land managed by the Cleveland National Forest or the Camp Pendleton Marine Corps Base. San Mateo Creek originates in the Cleveland National Forest and flows in a southwesterly direction through Camp Pendleton to the Pacific Ocean just south of San Clemente, California. Within the San Mateo Creek watershed, the majority of spawning and rearing habitat is upstream from Camp Pendleton within the Cleveland National Forest. That portion of San Mateo Creek on Camp Pendleton is primarily migratory habitat for steelhead.

That portion of the San Mateo Creek watershed that is located on Cleveland National Forest land has not been greatly altered by human activity over the past 50 years (Woelfel, 1991). Forest lands in the watershed have remained natural and undeveloped over this period although there are a few private property in-holdings which have had limited development. Woelfel (1991) reviewed water use on these private in-holdings and concluded that stream flows in the watershed were not significantly altered. According to Woelfel (1991), one of the main activities of the Cleveland National Forest has been the protection of vegetation and water resources in its various watersheds through the prevention of forest fires. In part, this effort was intended to protect and manage forest vegetation so that water resources were retained and water quality remained high. In the San Mateo Creek watershed this effort was not especially successful because of the rugged and isolated conditions.

The lower portion of San Mateo Creek watershed which flows through Camp Pendleton has been impacted by base activities (Woelfel, 1991). Groundwater extraction to support base military training operations and on-base agriculture has led to stream channel dewatering or reduced channel flows, loss of riparian vegetation, and increased erosion. Military training operations, including accidental fires caused by live ammunition use, have likely contributed to erosion problems in the watershed. The cumulative effect of groundwater extraction, reduction or loss of riparian vegetation, stream channel morphology changes, and accelerated erosion is that steelhead migration opportunities are impacted. Based on the available information, it unlikely that existing land and water management programs on Camp Pendleton provide sufficient protection for steelhead or its habitat in the San Mateo Creek watershed.

5. Other Natural or Human-Made Factors Affecting Continued Existence of Steelhead

Natural climatic conditions have exacerbated the problems associated with degraded and altered riverine and estuarine habitats. Persistent drought conditions have reduced already limited spawning, rearing and migration habitat. Climatic conditions appear to have resulted in decreased ocean productivity which, during more productive periods, may help offset degraded freshwater habitat conditions (NMFS, 1996).

Efforts Being Made to Protect Southern California Steelhead ESU

Section 4(b)(1)(A) of the ESA requires the Secretary of Commerce to make listing determinations solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species, including factors affecting the species, and after taking into account efforts being made to protect the species. Therefore, in making its listing determinations, NMFS first assesses the status of the species and identifies factors that have lead to the decline of the species. NMFS then assesses conservation measures to determine if they ameliorate risks to the species.

As part of its west coast steelhead status review, NMFS reviewed an array of protective efforts for west coast steelhead and other salmonids, including the Southern California steelhead ESU, ranging in scope from regional strategies to local watershed initiatives. NMFS has summarized some of the major efforts in a document entitled ''Steelhead Conservation Efforts: A Supplement to the Notice of Determination for West Coast Steelhead under the Endangered Species Act'' (NMFS, 1996c).

In the coastal area extending from Malibu Creek southward to San Mateo Creek, no steelhead-specific conservation efforts are currently in place, although there have been recent assessments of habitat distribution and restoration potential in the Camp Pendleton area (Lang *et al.*, 1998; and

DFG, 2000). Recently, however, the California voters passed a State-wide proposition which provides $800,000 for the restoration of San Mateo Creek and San Onofre Creek, both of which are located on Camp Pendleton, to support native fish species including the unarmored three-spined stickleback, arroyo chub, and steelhead. This restoration program is expected to focus on addressing control of exotic plants, control of exotic fish species which compete with and/or prey upon steelhead and other native species, restoration of streambed pools, channels and stream banks, and the reintroduction of native plants and possibly native fish species. A wide range of agencies and private organizations, including the Cleveland National Forest, Camp Pendleton Marine Corps Base, FWS, DFG, Trout Unlimited, San Diego Trout, and the Coastal Conservancy, are expected to participate in development of this program. NMFS strongly encourages this effort and intends to participate in its development and implementation.

In addition to this State funding directed at San Mateo Creek restoration, the U.S. Congress appropriated $9.0 million in Fiscal Year 2000 for Pacific Coastal Salmon Recovery in California. A Memorandum of Understanding has been signed between NMFS and the State of California that will govern the expenditure of these funds, some of which may be directed at habitat restoration and other related issues within the range of the Southern California steelhead ESU.

Proposed Determination

Section 3 of the ESA defines the term ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' The term ''threatened species'' is defined as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' In its previous status reviews for west coast salmon and steelhead, NMFS has identified a number of factors that should be considered in evaluating the level of risk faced by an ESU, including: (1) absolute numbers of fish and their spatial and temporal distribution; (2) current abundance in relation to historical abundance and current carrying capacity of the habitat; (3) trends in abundance; (4) natural and human-influenced factors that cause variability in survival and abundance; (5) possible threats to genetic integrity (e.g., from strays or outplants from hatchery programs); and (6) recent events (e.g., a drought or changes in harvest management) that have predictable short-term consequences for abundance of the ESU. Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, being made to protect such species.

As a result of its 1996 coast-wide status review of steelhead, NMFS concluded that the Southern California steelhead ESU constituted a ''species'' under the ESA (NMFS, 1996). Based on the information available at that time, NMFS concluded that the current range of this ESU extended from the Santa Maria River (inclusive) to, and including, Malibu Creek (61 FR 41541; 62 FR 43937). The recent information compiled by DFG (DFG, 2000) indicates that adult steelhead, which were most likely strays from elsewhere in the Southern California steelhead ESU, successfully spawned in San Mateo Creek during 1997 and subsequently reared through at least 1998 and 1999. In addition, steelhead have recently been observed in Topanga Creek which is located just a few miles south of Malibu Creek. Based on a consideration of this new information, including the existence of documented spawning and rearing habitat in the San Mateo Creek watershed (Lang *et al.*, 1998; DFG, 2000), NMFS now proposes to redefine the Southern California steelhead ESU to include any populations of steelhead (or their progeny) that occur in watersheds southward of Malibu Creek to, and including, San Mateo Creek.

Based on the best scientific information available in 1996, NMFS concluded that the Southern California steelhead ESU, as it was defined at that time (i.e., Santa Maria River to and including Malibu Creek), was in danger of extinction (NMFS, 1996; 61 FR 41541). This conclusion was based on the fact that steelhead had already been extirpated from much of its historic range in southern California, the extremely low abundance of extant steelhead populations, and the continued threats to the species from widespread habitat degradation and loss, water diversions and extraction, and other factors. As discussed previously in this document, there is no new information indicating that steelhead populations occurring in watersheds ranging from the Santa Maria River to Malibu Creek have increased in abundance since NMFS' final listing determination in 1997. In addition, steelhead are almost completely extirpated from coastal watersheds south of Malibu Creek, with the exception of their recent observations in San Mateo Creek and Topanga Creek, and occur in only very low abundance in those streams. Based on a consideration of this new information regarding steelhead presence south of Malibu Creek, NMFS concludes that the redefined Southern California steelhead ESU continues to be at a high risk of extinction.

Based on a review of the currently available information regarding the status of steelhead populations in the proposed redefined Southern California steelhead ESU (Santa Maria River to and including San Mateo Creek), as well as a consideration of the various factors affecting this steelhead ESU, NMFS proposes that the redefined ESU continues to warrant listing as an endangered species under the ESA. Only anadromous life forms (i.e., steelhead and their progeny) of *O. mykiss* within the range of this proposed redefined ESU will be part of the listed population.

As discussed previously in this document, the currently available information indicates that steelhead or their progeny have only been found in two watersheds, Topanga Creek and San Mateo Creek, located south of Malibu Creek. Based on the currently available information, NMFS believes that steelhead have been extirpated from virtually all other streams and rivers between Malibu Creek and San Mateo Creek, including the Los Angeles River, San Gabriel River, Santa Ana River, and San Juan Creek, because viable habitat is extremely limited or no longer exists. For these reasons, NMFS does not expect that steelhead will occur in these watersheds in the future absent major restoration efforts. Nevertheless, if steelhead or their progeny are found to occur in any stream or river between Malibu Creek and San Mateo Creek, NMFS will consider those fish to be part of the listed ESU, and, therefore, protected under the ESA. Because steelhead in this ESU may potentially stray to streams south of San Mateo Creek, NMFS will also consider steelhead or their progeny that occur south of San Mateo Creek to be part of the listed ESU unless there is evidence to indicate they are resident forms or derived from hatchery rainbow trout populations. NMFS will inform the public of the presence of southern California steelhead south of the proposed redefined ESU's range via a **Federal Register** document.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly

affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction. Section 9 prohibitions apply automatically to endangered species such as the redefined Southern California steelhead ESU.

Sections 7(a)(2) and 7(a)(4) of the ESA require Federal agencies to consult with NMFS to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or a species proposed for listing, or adversely modify critical habitat or proposed critical habitat. Federal agencies and actions that may be affected by the revision of the Southern California steelhead ESU and its critical habitat designation are the U.S. Forest Service (USFS) and their management and regulatory activities in Cleveland National Forest, the U.S. Marine Corps and its operation and management of Camp Pendleton Marine Corps Base, and the Corps of Engineers (COE) and its issuance of permits under the Clean Water Act.

Sections 10(a)(1)(A) and 10(a)(1)(B) of the ESA provide NMFS with authority to grant exceptions to the ESA's ''take'' prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. NMFS has issued section 10(a)(1)(A) research/enhancement permits for listed salmonids, including steelhead in the Southern California ESU, to conduct activities such as trapping and tagging and other research and monitoring activities.

Section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities conducting activities which may incidentally take listed species so long as the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. The types of activities potentially requiring a section 10(a)(1)(B) incidental take permit include the operation and release of artificially propagated fish by state or privately operated and funded hatcheries, state regulated angling, academic research not receiving Federal authorization or funding, road building, grazing, and diverting water onto private lands.

NMFS Policies on Endangered and Threatened Fish and Wildlife

On July 1, 1994, NMFS and FWS published a policy in the **Federal Register** (59 FR 34272) indicating that the agencies would, to the maximum extent practicable at the time a species is listed, identify those activities that will not be considered likely to result in violations of section 9, as well as activities that will be considered likely to result in violations. NMFS believes that, based on the best available information, the following actions will not result in a violation of section 9 with regard to steelhead in the redefined Southern California ESU:

1. Possession of steelhead which are acquired lawfully by permit issued by NMFS pursuant to section 10 of the ESA, or by the terms of an incidental take statement pursuant to section 7 of the ESA.

2. Federally funded or approved projects that involve activities such as military operations, agriculture, grazing, mining, road construction, discharge of fill material, stream channelization or diversion for which section 7 consultation has been completed, and when activities are conducted in accordance with any terms and conditions provided by NMFS in an incidental take statement accompanying a biological opinion.

Activities that NMFS believes could potentially harm steelhead in the redefined Southern California steelhead ESU, and, therefore, may violate the section 9 take prohibitions of the ESA include, but are not limited to:

1. Land-use activities that adversely affect steelhead habitat (e.g., agriculture, water extraction, recreational activities, road construction in riparian areas and areas susceptible to mass wasting and surface erosion).

2. Destruction/alteration of steelhead habitat, such as removal of woody debris or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow.

3. Discharges or dumping of toxic chemicals or other pollutants (e.g., sewage, oil, gasoline) into waters or riparian areas supporting steelhead.

4. Violation of discharge permits.

5. Pesticide applications.

6. Collecting or handling of steelhead. Permits to conduct these activities are available for purposes of scientific research or to enhance the propagation or survival of the species.

7. Introduction of non-native species likely to prey on steelhead or displace them from their habitat.

These lists are not exhaustive. They are intended to provide some examples of the types of activities that might or might not be considered by NMFS as constituting a prohibited take of steelhead in the Southern California steelhead ESU. Questions regarding whether specific activities may constitute a violation of the section 9 take prohibitions, and general inquiries regarding prohibitions and permits, should be directed to NMFS (see **ADDRESSES**).

Critical Habitat

Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, NMFS designate critical habitat concurrently with a determination that a species is endangered or threatened. While NMFS has completed its initial analysis and proposes that the San Mateo Creek population of steelhead be part of the Southern California steelhead ESU, and that the range of the ESU should, therefore, be extended from Malibu Creek to San Mateo Creek, the agency has not performed the full analysis necessary for determining whether the existing critical habitat designation for this ESU should be modified to include areas south of Malibu Creek. Prior to making any determination regarding the modification of the existing critical habitat designation, NMFS intends to complete an analysis of the additional habitat, if any, which is necessary for the conservation and recovery of this ESU. NMFS expects that a recovery team will be established in the near future to develop recovery goals for this ESU, and intends to rely on the team's analysis and recommendations in making any determination to modify the existing critical habitat. In conjunction with these efforts, NMFS also intends to work with Federal land managers (Camp Pendleton Marine Corps Base and Cleveland National Forest) to review and evaluate their existing land management and habitat protection programs to determine the extent to which they protect steelhead and its habitat in the San Mateo Creek watershed. It is NMFS intent to complete its analysis and make a determination about whether or not any habitat south of Malibu Creek should be incorporated into the existing critical habitat designation within the next year.

Public Comments Solicited

NMFS has exercised its best professional judgement in developing this proposal to redefine the Southern California steelhead ESU. To ensure that the final action resulting from this proposal will be as accurate and effective as possible, NMFS is soliciting comments and suggestions from the public, other governmental agencies, the scientific community, industry, and any other interested parties regarding the proposal. NMFS is interested in any relevant information concerning: (1) biological or other relevant data

concerning any threats to steelhead or its habitat in this redefined ESU; (2) the range, distribution, and population size of steelhead in this redefined ESU or in areas outside its southern boundary, including habitat utilization; (3) current or planned activities in the redefined ESU and their possible impact on steelhead or its habitat; and (4) efforts being made to protect steelhead or its habitat in this redefined ESU. Written comments on the proposal should be sent to NMFS (see **ADDRESSES** and **DATES**).

Public Hearings

NMFS has not scheduled any public hearings on this proposal. However, Joint Commerce-Interior ESA implementing regulations state that the Secretary ''shall promptly hold at least one public hearing if any person so requests within 45 days of publication of a proposed regulation to list ... or to designate or revise critical habitat.'' (see 50 CFR 424.16(c)(3)). Requests for public hearings must be received by February 2, 2001.

References

A complete list of all cited references is available upon request (see **ADDRESSES**).

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus*, 675 F. 2d 825 (6th Cir. 1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA). See NOAA Administrative Order 216-6.

Executive Order 12866 and Regulatory Flexibility Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition this proposed rule is exempt from review under Executive Order 12866.

Paperwork Reduction Act

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Executive Order 13132 - Federalism

In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual State and Federal interest, NMFS has conferred with state and local government agencies in the course of assessing the status of this ESU, and considered, among other things, state and local conservation measures. State and local governments have expressed support for both the conservation of this ESU and for those activities which affect it. NMFS staff have had discussions with various government agency representatives regarding the status of this ESU and have sought working relationships with them in order to promote restoration and conservation of this and other ESUs. As the process continues, NMFS intends to continue engaging in informal and formal contacts with affected State, regional, or local entities, giving careful consideration to all written and oral comments received on the proposed action. NMFS intends to consult, as needed, with appropriate elected officials in the promulgation of a final rule.

List of Subjects in 50 CFR Part 224

Administrative practices, and procedure, Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Dated: 11, 2000.

William T. Hogarth,

Deputy Assistant Administrator, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 224 is proposed to be amended as follows:

PART 224 -- ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531-1543; and 16 U.S.C. 1361 *et seq*.

2. In § 224.101, paragraph (a) is revised to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

(a) *Marine and anadromous fish.*The following table lists the common and scientific names of endangered species, the locations where they are listed, and the citations for the listings and critical habitat designations.

COMMON AND SCIENTIFIC NAMES

Species[1]		Where listed	When listed	Critical habitat
Common name	Scientific name			
Shortnose sturgeon	*Acipenser brevirosrtum*	U.S.A., northwestern Atlantic, in river systems from the Saint John River in New Brunswick, Canada, to the St. Johns River, Florida.	32 FR 4001, Mar. 11, 1967.	NA
Southern California steelhead	*Oncorhynchus mykiss*	U.S.A., CA, including all naturally spawned populations of steelhead (and their progeny) in streams from the Santa Maria River, San Luis Obispo County, California (inclusive) to San Mateo Creek, San Diego County, California (inclusive).	62 FR 43937, Aug. 18, 1997.	64 FR 5740, Feb. 5, 1999
Upper Columbia River steelhead	*Oncorhynchus mykiss*	U.S.A., WA, including the Wells Hatchery stock and all naturally spawned populations of steelhead (and their progeny) in streams in the Columbia River Basin upstream from the Yakima River, Washington, to the U.S.-Canada Border.	62 FR 43937, Aug. 18, 1997.	64 FR 5740, Feb. 5, 1999
Snake River sockeye salmon	*Oncorhynchus nerka*	U.S.A., ID, Snake River	56 FR 58619, Nov. 20, 1991.	58 FR 68543, Dec. 28, 1993

COMMON AND SCIENTIFIC NAMES—Continued

Species[1]		Where listed	When listed	Critical habitat
Common name	Scientific name			
Upper Columbia River spring-run chinook salmon	*Oncorhynchus tshawytscha*	U.S.A., WA, including all naturally spawned populations of chinook salmon in Columbia River tributaries upstream of the Rock Island Dam and downstream of Chief Joseph Dam in Washington (excluding the Okanogan River), the Columbia River from a straight line connecting the west end of the Clatsop jetty (south jetty, Oregon side) and the west end of the Peacock jetty (north jetty, Washington side) upstream to Chief Joseph Dam in Washington, and the Chiwawa River (spring run), Methow River (spring run), Twisp River (spring run), Chewuch River (spring run), White River (spring run), and Nason Creek (spring run) hatchery stocks (and their progeny).	64 FR 14308, Mar. 24, 1999.	65 FR 7764, Feb. 16, 2000
Sacramento River winter-run chinook salmon	*Oncorhynchus tshawytscha*	U.S.A., CA, Sacramento River	59 FR 13836, Mar. 23, 1994.	58 FR 33212, Jun. 16, 1993
Salmon, Atlantic	*Salmo Salar*	U.S.A., ME Gulf of Maine Atlantic Salmon Distinct Population Segment, which includes all naturally reproducing wild populations and those river-specific hatchery populations of Atlantic salmon having historical, river-specific characteristics found north of and including tributaries of the lower Kennebec River to, but not including, the mouth of the St. Croix River at the U.S.-Canada border. To date, the Services have determined that these populations are found in the Dennys, East Machias, Machias, Pleasant, Narraguagus, Sheepscot, and Ducktrap Rivers and in Cove Brook, Maine..	.....	NA
Totoaba	*Cynoscion macdonaldi*	Mexico, Gulf of CA	44 FR 29480, May 21, 1979.	NA

[1]Species includes taxonomic species, subspecies, distinct population segments (or DPSs, as defined in 61 FR 4722, February 7, 1996), and evolutionarily significant units (or ESUs, as defined in 56 FR 58612, November 20, 1991)

[FR Doc. 00–32167 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 65, No. 244
Tuesday, December 19, 2000

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 14, 2000.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 *and* to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–6746.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: Certificate for Quota Eligibility.

OMB Control Number: 0551–0014.

Summary of Collection: Section 5 (a)(i) of the Harmonized Tariff Schedule of the United States authorizes the Secretary of Agriculture to establish a raw-cane sugar tariff-rate quota (TRQ). Section 5(b)(i) authorized the U.S. Trade Representative to allocate the raw-cane sugar tariff-rate quota among supplying countries. Certificates of Quota Eligibility (CQE) are issued to the 40 countries that receive TRQ allocations to export sugar to the United States. The CQE is completed by the certifying authority in the foreign country who certifies that the sugar that will be exported to the United States was produced in the foreign country that has the TRQ allocation. The Foreign Agricultural Service (FAS) will collect information using form FSA–961.

Need and Use of the Information: FAS will collect the quantity, name of shipper, name of vessel, and port of loading. The information will help FAS determine if the quantity to be imported is eligible to be entered under the TRQ.

Description of Respondents: Business or other for-profit; individuals or households.

Number of Respondents: 40.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 200.

Foreign Agricultural Service

Title: CCC's Supplier Credit Guarantee Program (SCGP).

OMB Control Number: 0551–0037.

Summary of Collection: The Supplier Credit Guarantee Program (SCGP) offers credit guarantees to exporters in order to maintain and increase overseas importer's ability to purchase U.S. agricultural goods. The SCGP is designed to assist exporters of U.S. agricultural commodities who wish to provide relatively short-term (up to 180 days) credit to their importers evidenced by promissory notes executed by such importers. Under 7 CFR Part 1493, exporters are required to submit the following: (1) Information about the exporter for program participation; (2) export sales information in connection with applying for a payment guarantee; (3) information regarding the actual export of the commodity (evidence of export report); (4) notice of default and claims for loss; and (5) other documents, if applicable, including notice assignment of the right to receive proceeds under the export credit guarantee. The Foreign Agricultural Service (FAS) will collect information using the guarantee application, export report and assignment notice from the participants by mail, fax, e-mail, and telephone.

Need and Use of the Information: FAS will collect information to manage, plan, evaluate and account for government resources. The reports and records are required to ensure the proper and judicious use of public funds.

Description of Respondents: Business or other for-profit.

Number of Respondents: 288.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 1,166.

Farm Service Agency

Title: Insured Farm Ownership Loan Policies, Procedures, and Authorizations.

OMB Control Number: 0560–0157.

Summary of Collection: The Consolidated Farm and Rural Development Act (CONACT) provides authorization to the Secretary of Agriculture to make and insure loans to farmers and ranchers. In addition, the Secretary is authorized to make such rules and regulations, prescribe the terms and conditions for making and insuring loans, security instruments and agreements. The Farm Service Agency (FSA) Administrator has been delegated the authority to administer the farm ownership loan program in accordance with the requirements in 7 CFR part 1943 subpart A.

Need and Use of the Information: The agency uses the information to evaluate loan making or loan servicing proposals. The information is needed by the agency to evaluate an applicant's eligibility, and to determine if the operation is economically feasible and the security offered in support of the loan is adequate. If this information were not collected, the agency and applicant would be unable to adequately bind a real estate sales contract and meet the congressionally mandated mission of loan programs.

Description of Respondents: Individuals or households; Farms.

Number of Respondents: 210.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 54.

Agricultural Marketing Service

Title: National Research, Promotion, and Consumer Information Programs.

OMB Control Number: 0581–0093.

Summary of Collection: The U.S. Department of Agriculture has the responsibility for implementing and overseeing programs for a variety of commodities including cotton, dairy, eggs, beef, pork, soybeans, honey, potatoes, watermelons, mushrooms, kiwifruit, popcorn, and olive oil. Various Acts authorize these programs to carry out projects relating to research, consumer information, advertising, sales promotion, producer information, market development and product research to assist, improve, or promote the marketing, distribution, and utilization of their respective commodities.

Need and Use of the Information: The Secretary of Agriculture appoints board members and approves the boards' budgets, plans, and projects. This responsibility has been delegated to the Agricultural Marketing Service (AMS). AMS' objective in carrying out this responsibility is to ensure the following: (1) Funds are collected and properly accounted for; (2) expenditures of all funds are for the purposes authorized by enabling legislation; and (3) that each board's administration of the programs conforms to USDA policy. The applicable commodity program areas within AMS have direct oversight over the respective programs. The boards administer the various programs utilizing a variety of forms to carry out their responsibilities. Only authorized employees of the various boards and USDA employees will use the information collected. If this data were collected less frequently, (1) it would hinder data needed to collect and refund assessments in a timely manner and result in delayed or even lost revenue; (2) the boards would be unable to carry out the responsibilities of their respective Acts; and (3) additional record keeping requirements would be imposed.

Description of Respondents: Business or other for profit; Farms; Federal Government.

Number of Respondents: 321,510.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Weekly; Monthly; Semi-annually; Annually.

Total Burden Hours: 354,066.

Agricultural Marketing Service

Title: Pricing Pilot program.

OMB Control Number: 0581–0190.

Summary of Collection: The Pricing Pilot Program was included in the Consolidated Appropriations Act of 2000 (Section 3 of H.R. 3428 of the 106th Congress, as enacted by Section 1001(a)(8) of Public Law 106–113 (113 Stat. 1536) and signed into law on November 29, 1999). Dairy farmers must sign a disclosure statement before participating in the pilot program. The effect of the amendment is to permit a handler to pay producers or cooperative associations a negotiated price, rather than the minimum Federal order price, for milk that is under forward contract, provided that such milk does not exceed the handler's non-fluid use of milk for the month. The pilot project enables the Agricultural Marketing Services (AMS) to conduct a study of forward contracting to determine the impact on milk prices paid to producers in the U.S. This is a voluntary program and only applies to federally regulated milk that is not packaged for fluid use.

Need and Use of the Information: AMS will collect information to review the contract to ensure it has been signed before exempting a handler from paying a contracting producer the minimum order price for that portion of his or her milk that is covered by the contract. AMS will also determine the impact on milk prices paid to producers in the United States. Dairy farmers will have to sign a disclosure statement, before entering into a forward contract. The disclosure statement, contains guidelines to help the dairy farmers understand the forward contract process. It will be completed by dairy farmers who choose to participate in the pilot program. If the information is not collected the forward pricing pilot program that was mandated by Congress will not be able to be conducted and forward pricing contracts would not be recognized under the Federal Order program.

Description of Respondents: Farms.

Number of Respondents: 8000.

Frequency of Response: Reporting: On occasion.

Total Burden Hours: 2000.

Agricultural Marketing Service

Title: Marketing Order Committee/Board Interview.

OMB Control Number: 0581–0195.

Summary of Collection: Under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), industries enter into order and agreement programs. Order and agreement regulations help ensure adequate supplies of high quality products for consumers and adequate returns to producers. Order and agreement programs provide an opportunity for producers of fresh fruit, vegetables, and specialty crops in specified production areas to work together to solve marketing problems that cannot be solved individually. Currently, there are 37 orders and agreements in effect.

Need and Use of the Information: The information collected is used to conduct interviews of managers and committees and board members for order and agreement programs. Interviews will enable the agency to better understand the factors that encourage or discourage committee/board participation. The Department of Agriculture will use the information to develop a training program and to encouraging eligible women, minorities, and people with disabilities to participate on USDA's order and agreement committee and boards. Authorized representatives of USDA, including Agricultural Marketing Service (AMS), Fruit and Vegetable Programs' regional and headquarters' staff will use the information collected. Collecting the information less frequently would eliminate data needed to keep the respective marketing order industries and the Secretary abreast of changes or improvements in committee/board operations at the local level.

Description of Respondents: Farms.

Number of Respondents: 8000.

Frequency of Response: Reporting: On occasion.

Total Burden Hours: 2000.

Forest Service

Title: Operating Plan.

OMB Control Number: 0596–0086.

Summary of Collection: The National Forest Management Act, 16 U.S.C. 472a (14)(c) (Act), requires timber sale operating plans on timber sales that exceed 2 years in length. The regulations at 36 CFR 223.32 have a similar requirement. The operating plans are collected within 60 days of award of timber sale contracts and annually thereafter until harvest is complete. There is no prescribed format for the collection of the information. Timber sale purchases may submit the required information in the form of a chart or letter using surface mail, electronic mail, or via facsimile. The information is based on the timber sale purchaser's business plan.

Need and Use of the Information: Forest Service (FS) will collect information to determine eligibility for additional contract time. In addition, the information is used to plan the agency timber sale contract administration workload and to meet other contract obligations. The

information collected includes planned periods and methods of anticipated major activities, including, road construction, timber harvesting, and completion of other contract requirements.

Description of Respondents: Business or other for-profit; Individuals or households.

Number of Respondents: 2,500.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 1,875.

National Agricultural Statistics Service

Title: Milk and Milk Products.

OMB Control Number: 0535–0020.

Summary of Collection: U.S. Code Title 7, Section 2204, specifies that ''the Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain * * * by the collection of statistics * * * and shall distribute them among agriculturists.'' The National Agricultural Statistics Services (NASS) primary function is to prepare and issue current official state and national estimates of crop and livestock production. Estimates of milk production and manufactured dairy products are an integral part of this program. Milk and dairy statistics are used by the U.S. Department of Agriculture (USDA) to help administer price support programs and by the dairy industry in planning, pricing, and projecting supplies of milk and milk products.

Need and Use of the Information: NASS will collect information to develop and implement a biweekly cream/milkfat price survey to benefit all segments of the dairy industry. This data will be collected as a pilot project for a minimum of two months. The date will be analyzed for accuracy, response/cooperation from manufacturers, and other related factors. Continuation of this survey will depend on the results of the analysis. Major users of cream/milkfat, including manufacturers of processed cheese, butter, cream cheese, and ice cream mix, will base biweekly milkfat prices on purchases. The selected firms account for about 85 percent of the U.S. total milkfat used in these products. Only U.S. level data will be published to avoid disclose problems that regional data would present.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 44,689.

Frequency of Responses: Reporting: Quarterly; Weekly; Monthly; Annually.

Total Burden Hours: 21,571.

Food and Nutrition Service

Title: Quality Control Review Schedule.

OMB Control Number: 0584–0299.

Summary of Collection: State agencies are required to perform Quality Control (QC) reviews for the Food Stamp Program (FSP). The legislative basis for the operation of the QC system is provided by Section 16 of the Food Stamp Act of 1977. The FNS–380–1, Quality Control Review Schedule, is for State use to collect both QC data and case characteristics for the Food Stamp Program and to serve as the comprehensive data entry form for FSP QC reviews.

Need and Use of the Information: The Food and Nutrition Service (FNS) will collect information to monitor and reduce errors, develop policy strategies, and analyze household characteristic data. In addition, FNS will use the data to determine sanctions and incentive based on error rate performance, and to estimate the impact of some program changes to FSP participation and costs by analyzing the available household characteristic data.

Description of Respondents: State, Local, or Tribal Government; Federal Government; Farms; Individuals or households.

Number of Respondents: 53.

Frequency of Responses: Recordkeeping; Reporting: Weekly; Monthly.

Total Burden Hours: 58,686.

Rural Utilities Service

Title: Environmental Policies and Procedures (7 CFR Part 1794).

OMB Control Number: 0572–0117.

Summary of Collection: The Rural Utilities Service (RUS) published its revised Environmental Policies and Procedures in December, 1998. The rule promulgated environmental regulations that cover all RUS Federal actions taken by RUS' electric, telecommunications, water and environmental programs. The regulation was necessary to ensure continued RUS compliance with the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) (40 CFR Parts 1500–1508), and certain related Federal environmental laws, statutes, regulations, and Executive Orders. RUS electric, telecommunications, water and environmental program borrowers provide environmental documentation to assure that policy contained in NEPA is followed.

Need and Use of the Information: RUS will collect information to evaluate the cost and feasibility of the proposed project and the environmental impact.

Description of Respondents: Non-for-profit institutions; Business or other for-profit.

Number of Respondents: 600.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 450,200.

Nancy B. Sternberg,

Departmental Clearance Officer.

[FR Doc. 00–32298 Filed 12–18–00; 8:45 am]

BILLING CODE 3410–01–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[TM–00–201]

Notice of Program Continuation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice inviting applications for fiscal year (FY) 2001 grant funds under the federal-state marketing improvement program.

SUMMARY: Notice is hereby given that the Federal-State Marketing Improvement Program (FSMIP) was allocated $1,350,000 in the Federal budget for FY 2001. Funds remain available for this program. States interested in obtaining funds under the program are invited to submit Proposals. While only State Departments of Agriculture or other appropriate State Agencies are eligible to apply for funds, State Agencies are encouraged to involve industry groups and community-based organizations in the development of proposals and the conduct of projects.

DATES: Funds will be allocated on the basis of two rounds of consideration. Proposals received by February 9, 2001 will be considered during the first round. Proposals which are not selected for funding during the first round and other proposals received by May 11, 2001 will be considered during the second round.

ADDRESSES: Proposals may be sent to: FSMIP Staff, Transportation and Marketing Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, Room 4006 South Building, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: Debra Tropp, (202) 720–2704.

SUPPLEMENTARY INFORMATION: FSMIP is authorized under Section 204(b) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*). The program is a matching fund program designed to assist State Departments of Agriculture or other appropriate State agencies in

conducting studies or developing innovative approaches related to the marketing of agricultural products. Other organizations interested in participating in this program should contact their State Department of Agriculture's Marketing Division to discuss their proposal.

Mutually acceptable proposals are submitted by the State Agency and must be accompanied by a completed Standard Form (SF)–424 with SF–424A and SF–424B attached. FSMIP funds may not be sued for advertising or, with limited exceptions, for the purchase of equipment or facilities. Guidelines may be obtained from your State Department of Agriculture or the above AMS contact.

Funds can be requested for a wide range of marketing research and marketing service activities, including projects aimed at:

(1) Developing and testing new or more efficient methods of processing, packaging, handling, storing, transporting, and distributing food and other agricultural products;

(2) Assessing customer response to new or alternative agricultural products or marketing services and evaluating potential opportunities for U.S. producers, processors and other agribusinesses, in both domestic and international markets; and

(3) Identifying problems and impediments in existing channels of trade between producers and consumers of agricultural products and devising improved marketing practices, facilities, or systems to address such problems.

While all proposals which fall within the FSMIP guidelines will be considered, States are encouraged to submit proposals in the following areas, which correspond with ongoing national initiatives in support of:

(1) Small farms—to increase the base of marketing research and marketing services of particular importance to small-scale, limited-resource farmers and rural agribusinesses, with emphasis on projects aimed at identifying and improving producers' abilities to participate in alternative domestic and export markets;

(2) Direct marketing—to identify and evaluate opportunities for producers to respond directly to new or expanding consumer demands for products and value-adding services, with emphasis on projects which concurrently address the needs of presently under served consumers; and

(3) Sustainable agriculture—to encourage the development of marketing channels and methods consistent with maintaining or improving the environment, with emphasis on projects aimed at expanding consumers' choices with regard to the environmental impact of alternative production and marketing technologies.

Copies of the FSMIP guidelines may be obtained by contacting the person listed as the contact for further information. FSMIP is listed in the ''Catalog of Federal Domestic Assistance'' under number 10.156 and subject agencies must adhere to Title VI of the Civil Rights Act of 1964, which bars discrimination in all Federally assisted programs.

Authority: 7. U.S.C. 1621–1627.

Dated: December 12, 2000.

Aggie Thompson,

Acting Deputy Administrator, Transportation and Marketing Programs.

[FR Doc. 00–32295 Filed 12–18–00; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

The Emergency Food Assistance Program Availability of Commodities for Fiscal Year 2001

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the surplus and purchased commodities that the Department expects to make available for donation to States for use in providing food assistance to the needy under the Emergency Food Assistance Program (TEFAP) in Fiscal Year (FY) 2001. The commodities made available under this notice shall, at the discretion of the State, be distributed to organizations for use in preparing meals, and/or for distribution to households for home consumption.

EFFECTIVE DATE: October 1, 2000.

FOR FURTHER INFORMATION CONTACT: Lillie Ragan, Assistant Branch Chief, Household Programs Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302–1594 or telephone (703) 305–2662.

SUPPLEMENTARY INFORMATION:

Background and Need for Action

Surplus Commodities

Surplus commodities donated for distribution under TEFAP are Commodity Credit Corporation (CCC) commodities determined to be available for donation by the Secretary of Agriculture under the authority of section 416 of the Agricultural Act of 1949, 7 U.S.C. 1431 (section 416) and commodities purchased under the surplus removal authority of section 32 of the Act of August 24, 1935, 7 U.S.C. 612c (section 32). The types of commodities typically made available under section 416 include dairy, grains, oils, and peanut products. The types of commodities purchased under section 32 include meat, poultry, fish, vegetables, dry beans, juices and fruits. Donations of surplus commodities were initiated in 1981 as part of the Department's efforts to reduce stockpiles of government-owned commodities, such as cheese, flour, butter, and cornmeal, which had been acquired under section 416. These donations responded to concern over the costs to taxpayers of storing large quantities of foods, while at the same time there were persons in need of food assistance. Because of changes in the agricultural commodity loan programs which have brought supply and demand into better balance, and accelerated donations and sales, the supply of surplus commodities has been reduced from the early 1980s. However, this trend reversed itself beginning in FY 1997. In FY 2000, the Department purchased over $159.5 million worth of surplus commodities. Most of these were purchased with Section 32 funds. The authority to donate surplus commodities for distribution through TEFAP is currently codified in Section 202 of the Emergency Food Assistance Act of 1983, 7 U.S.C. 7502 (EFAA).

In FY 2001, the Department anticipates that there will be sufficient quantities of nonfat dry milk available for donation under section 416, and raisins and frozen lamb under section 32, to support the distribution of these commodities through TEFAP in FY 2001. The Department would like to point out that commodity acquisitions are based on changing agricultural market conditions; therefore, the availability of commodities is subject to change. Approximately half of the surplus commodities purchased in FY 2000 will be delivered in FY 2001. These commodities include frozen lamb roasts, frozen sausage, trail mix, dried cranberries, dried and frozen cherries, frozen strawberries, frozen and canned peaches, fresh and canned pears, figs, almonds, and the following canned items: cranberry sauce, applesauce, apricots, grape juice, cranapple juice, apple juice, and tomato products.

In addition to the surplus commodities the Department expects to make available under sections 416 and 32, the Agricultural Risk Protection Act of 2000, Public Law 106–224, makes

$200 million available for use in purchasing specialty crops that experienced low prices during the 1998 and 1999 crop years. These include apples, black-eyed peas, cherries, citrus crops, cranberries or cranberry products, onions, melons, peaches, and potatoes. Section 816 of the Agriculture, Rural Development, Food and Drug Administration, and Related Activities Appropriation Act of 2001 (Public Law 106–387) requires that not less than $30 million of the total $200 million be used for cranberry products. A significant amount of these commodities will be made available for distribution through TEFAP in FY 2001.

Purchased Commodities

Congress responded to the reduced availability of surplus commodities with section 104 of the Hunger Prevention Act of 1988, Public Law 100–435, which added sections 213 and 214 to the EFAA. Those sections require the Secretary to purchase commodities for distribution to States in addition to those surplus commodities which otherwise might be provided to States for distribution under TEFAP. Under section 871(d) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, Congress repealed the authorization of funds for food purchases under section 214 of the EFAA. However, section 871(g) added a new section 27 to the Food Stamp Act of 1977, 7 U.S.C. 2011, *et seq.* (FSA), under which the Secretary is required to use $100 million from the funds made available to carry out the FSA for each of FYs 1997 through 2002 to purchase a variety of nutritious and useful commodities and distribute the commodities to States for distribution through TEFAP. In addition to the $100 million, the Agriculture, Rural Development, Food and Drug Administration, and Related Activities Appropriation Act of 2001 (Pub. L. 106–387), provides a separate administrative funding appropriation of $45 million that is allocated among States in the same manner as commodities. At the discretion of each State, any funds remaining after the State has met the EFAA requirement that at least 40 percent of all funds received must be provided to cover the direct expenses of emergency feeding organizations may be used by the Department to purchase additional commodities for TEFAP (7 U.S.C. 7508).

For FY 2001, the Department anticipates purchasing the following commodities for distribution through TEFAP: Dehydrated potatoes, corn syrup, egg mix, blackeye beans, great northern beans, kidney beans, lima beans, pinto beans, prunes, raisins, bakery mix, lowfat bakery mix, egg noodles, white corn grits, macaroni, oats, peanut butter, rice, spaghetti, vegetable oil, rice cereal, corn flakes, corn squares, oat cereal, frozen ground beef, frozen chicken, frozen turkey roast, and the following canned items: Green beans, refried beans, vegetarian beans, cream corn, whole kernel corn, sliced potatoes, spaghetti sauce, tomatoes, tomato sauce, tomato soup, vegetarian soup, apple juice, grapefruit juice, orange juice, pineapple juice, tomato juice, peaches, pineapples, applesauce, pears, plums, beef, beef stew, chicken, pork, tuna, and roasted peanuts. In addition, the Department expects to purchase the following new items: Frozen ham, bran flakes, canned carrots, and cranapple juice. The amounts of each item purchased will depend on the prices the Department must pay, as well as the quantity of each item requested by the States. Changes in agricultural market conditions may result in the availability of additional types of commodities or the non-availability of one or more types listed above. State officials will be responsible for determining how to allocate the commodities each State receives among eligible organizations. States have full discretion in determining the amount of commodities that will be made available to organizations for distribution to needy households for use in home-prepared meals or for providing prepared meals to the needy at congregate feeding sites.

Dated: December 12, 2000.

George A. Braley,

Acting Administrator.

[FR Doc. 00–32287 Filed 12–18–00; 8:45 am]

BILLING CODE 3410–30–U

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–801]

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of amended final results of antidumping duty administrative reviews.

SUMMARY: On November 15, 2000, the Department of Commerce published the amended final results of administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom (see 65 FR 68974). The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof. The period of review is May 1, 1993, through April 30, 1994. Subsequent to publication of these results, we found that one matter, relating to the reviews of the orders on antifriction bearings and parts thereof from Germany, remains pending before the United States Court of Appeals for the Federal Circuit and that, consequently, the amended results do not reflect the final results of review for the respondent-company FAG Kugelfischer Georg Schaefer AG.

EFFECTIVE DATE: December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Edythe Artman or Richard Rimlinger, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4733.

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Tariff Act), are references to the provisions in effect as of December 31, 1994. In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to the regulations as codified at 19 CFR part 353 (1995).

SUPPLEMENTARY INFORMATION:

Background

On November 15, 2000, the Department of Commerce published the amended final results of administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom. The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof. The period of review is May 1, 1993, through April 30, 1994.

In our notice of amended final results, we stated that all litigation pertaining to the results of the reviews was final and conclusive. This statement was erroneous; one matter relating to the administrative reviews of the orders on antifriction bearings and parts thereof from Germany remains pending before the United States Court of Appeals for the Federal Circuit (CAFC). This matter concerns the final results of review for one respondent, FAG Kugelfischer Georg Schaefer AG (FAG Germany). Hence, the results for FAG Germany that we published in our notice of amended final results do not reflect the final results for this company. We will not instruct the U.S. Customs service to liquidate entries for this company until all final and conclusive action has been taken on the pending matter and after we have published amended final results of review for this respondent.

Amendment to Final Results

The amended final results of the administrative review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof from Germany that we published in a notice of amended final results of review on November 15, 2000, do not reflect the final results for the respondent-company FAG Germany.

This notice is published pursuant to section 751(a) of the Tariff Act.

Dated: December 11, 2000.

Troy H. Cribb,

Assistant Secretary for Import Administration.

[FR Doc. 00–32170 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–824]

Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of antidumping duty administrative review.

SUMMARY: On October 2, 2000, the Department of Commerce published in the **Federal Register** (65 FR 58733) a notice announcing the initiation of an administrative review of the antidumping duty order on Certain Corrosion-Resistant Carbon Steel Flat Products from Japan for three producers/exporters, Nippon Steel Corporation (''Nippon''), Kawasaki Steel Corporation (''Kawasaki''), and Daido Metal Corporation (''Daido'') covering the period of review (''POR''), which is August 1, 1999 through July 31, 2000. The Department of Commerce is rescinding this review with respect to Nippon and Kawasaki pursuant to a timely request from petitioners, the only party that requested the review of these companies. In addition, we are rescinding this review with respect to Daido because, on November 21, 2000, its affiliated U.S. importer, Dana Glacier Daido America, LLC (''Dana''), who had requested the review, withdrew its request for this review within 90 days of the date of publication of notice of initiation, pursuant to 19 CFR 351.213(d)(1). Petitioners did not request a review of Daido.

EFFECTIVE DATE: December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Catherine Bertrand, Brandon Farlander, or Laurel LaCivita, Office 9, AD/CVD Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3207, (202) 482-0182, or (202) 482–4243, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended, are to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department) regulations are to the regulations codified at 19 CFR part 351 (2000).

Background

The Department published in the **Federal Register** on August 16, 2000 (65 FR 49962) a ''Notice of Opportunity to Request Administrative Review'' of the antidumping duty order on Certain Corrosion-Resistant Carbon Steel Flat Products from Japan. On August 31, 2000, petitioners requested that the Department conduct an administrative review of this order with respect to Nippon and Kawasaki. Also, on August 31, 2000, Dana requested an administrative review for merchandise produced by Daido and imported by Dana, pursuant to 19 U.S.C. section 1675(a)(1) and 19 CFR section 351.213(b)(3). On October 2, 2000, the Department initiated an administrative review for the period August 1, 1999 through July 31, 2000 (65 FR 58733). On October 3, 1999, the Department issued questionnaires to Nippon, Kawasaki, and Daido.

Kawasaki

On November 8, 2000, Kawasaki submitted section A of its questionnaire response. On December 6, 2000, petitioners requested that the Department rescind the review with respect to Kawasaki. Petitioners were the only party requesting the review and their request for withdrawal was made within 90 days of the date of publication of the notice of initiation in accordance with 19 CFR section 351.213(d)(1) of the Department's regulations. The Department is therefore rescinding the review with respect to Kawasaki in accordance with that regulation.

Nippon

On October 31, 2000, Nippon submitted section A of its questionnaire response. On December 6, 2000, petitioners requested that the Department rescind the review with respect to Nippon. Petitioners were the only party requesting the review and their request for withdrawal was made within 90 days of the date of publication of the notice of initiation in accordance with 19 CFR section 351.213(d)(1). The Department is therefore rescinding the review with respect to Nippon in accordance with that regulation.

Daido

On November 21, 2000, U.S. importer Dana withdrew its request for administrative review of Daido. Dana was the only party requesting the review and its request for withdrawal was made within 90 days of the date of publication of the notice of initiation in accordance with 19 CFR section 351.213(d)(1). The Department is therefore rescinding the review with respect to Daido in accordance with that regulation.

This notice is issued and published in accordance with 19 CFR section 351.213(d)(4).

Dated: December 12, 2000.

Joseph A. Spetrini,

Deputy Assistant Secretary, AD/CVD Enforcement Group III.

[FR Doc. 00–32172 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

National Institute of Standards and Technology Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 00–029.

Applicant: National Institute of Standards and Technology, Gaithersburg, MD 20899–8221.

Instrument: Vacuum Balance and Vacuum Chamber.

Manufacturer: Metrotec Engineering ag, Switzerland.

Intended Use: See notice at 65 FR 62334, October 18, 2000.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument provides: (1) Resolution of 0.1 μg, (2) a fully automated chamber permitting continuous unattended weighing and (3) repeatability of measurements under vacuum to 0.3 μg. The U.S. Air Force Measurement and Standards Laboratories advised November 28, 2000 that (1) these capabilities are pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 00–32171 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Olympic Coast National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Olympic Coast National Marine Sanctuary (OCNMS) is seeking applicants for the following vacant seats on its Sanctuary Advisory Council (Council): The Marine Business/Ports/Industry seat and the Fishing seat. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the conservation and management of marine resources; and the length of residence or experience in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve three-year terms, pursuant to the Council's Charter.

DATES: Applications are due by December 29, 2000.

ADDRESSES: Application kits may be obtained by from Andrew Palmer at 138 W. First St., Port Angles, WA 98362–2600. completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Andrew Palmer at (360) 467–6622, ex. 30, or email at Andrew.Palmer@noaa.gov.

SUPPLEMENTARY INFORMATION: The OCNMS Advisory Council was originally established in August 1995 and has a broad representation consisting of 19 members. The Council represents the coordination link between the Sanctuary and the state and federal management agencies, Native American tribes, researchers, educators, policy makers, and other various groups that help to focus efforts for management and protection of natural and cultural resources of the Olympic Coast National Marine Sanctuary.

The Council functions in an advisory capacity to the Sanctuary Superintendent and is instrumental in helping produce annual operating plans and reports by identifying education, outreach, research, long-term monitoring, resource protection and revenue enhancement priorities. The Council works in concert with the Sanctuary Superintendent by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Superintendent in achieving the goals of the Sanctuary program.

Authority: 16 U.S.C. Section 1431 *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: December 13, 2000.

Margaret A. Davidson,

Acting Assistant Administrator for Ocean and Coastal Zone Management.

[FR Doc. 00–32303 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–08–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Limits and Guaranteed Access Levels for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Costa Rica

December 13, 2000.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits and guaranteed access levels.

EFFECTIVE DATE: January 1, 2001.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.gov. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits and Guaranteed Access Levels (GALs) for textile products, produced or manufactured in Costa Rica and exported during the period January 1, 2001 through December 31, 2001 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

In the letter published below, the Chairman of CITA directs the

Commissioner of Customs to establish limits and guaranteed access levels for 2001.

These specific limits and guaranteed access levels do not apply to goods that qualify for quota-free entry under the Trade and Development Act of 2000.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 64 FR 71982, published on December 22, 1999). Information regarding the 2001 CORRELATION will be published in the **Federal Register** at a later date.

Requirements for participation in the Special Access Program are available in **Federal Register** notice 63 FR 16474, published on April 3, 1998.

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 13, 2000.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2001, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Costa Rica and exported during the twelve-month period beginning on January 1, 2001 and extending through December 31, 2001, in excess of the following restraint limits:

Category	Twelve-month limit
340/640	1,375,545 dozen.
342/642	507,791 dozen.
347/348	2,318,099 dozen.
443	225,536 numbers.
447	12,160 dozen.

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2000 shall be charged to the applicable category limits for that year (see directive dated September 13, 1999) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

Also pursuant to the ATC, and under the terms of the Special Access Program, as set forth in 63 FR 16474 (April 3, 1998), you are directed to establish guaranteed access levels for properly certified cotton, wool and man-made fiber textile products in the following categories which are assembled in Costa Rica from fabric formed and cut in the United States and re-exported to the United States from Costa Rica during the period beginning on January 1, 2001 and extending through December 31, 2001:

Category	Guaranteed access level
340/640	650,000 dozen.
342/642	250,000 dozen.
347/348	1,500,000 dozen.
443	200,000 numbers.
447	4,000 dozen.

Any shipment for entry under the Special Access Program which is not accompanied by a valid and correct certification in accordance with the provisions of the certification requirements established in the directive of May 15, 1990 (55 FR 21074), as amended, shall be denied entry unless the Government of Costa Rica authorizes the entry and any charges to the appropriate specific limit. Any shipment which is declared for entry under the Special Access Program but found not to qualify shall be denied entry into the United States.

These specific limits and guaranteed access levels do not apply to goods that qualify for quota-free entry under the Trade and Development Act of 2000.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of U.S.C.553(a)(1).

Sincerely,

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 00–32288 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–DR–F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in India and Extension of Suspension of Group II Restriction for Certain Man-Made Fiber Textile Products Produced or Manufactured in India

December 13, 2000.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits and extending suspension of the Group II restriction for certain products from India.

EFFECTIVE DATE: January 1, 2001.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.gov. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits for textile products, produced or manufactured in India and exported during the period January 1, 2001 through December 31, 2001 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

In addition, a document published in the **Federal Register** on December 16, 1999 (64 FR 70219) announced the extension of the suspension of the Group II restriction for rayon filament yarn in HTS number 5403.31.0040 in Category 606 from India for the period January 1, 2000 through December 31, 2000. Also see 62 FR 60826, published on November 13, 1997.

The Committee for the Implementation of Textile Agreements has decided to extend the suspension for an additional twelve-month period beginning on January 1, 2001 and extending through December 31, 2001. A visa is still required for this product.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish the 2001 limits and extend the suspension of the Group II restriction. The 2001 limits for certain categories have been reduced for carryforward applied to the 2000 limits.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 64 FR 71982, published on December 22, 1999. Information regarding the 2001

CORRELATION will be published in the **Federal Register** at a later date.

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 13, 2000.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2001, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, man-made fiber, silk blend and other vegetable fiber textiles and textile products in the following categories, produced or manufactured in India and exported during the twelve-month period beginning on January 1, 2001 and extending through December 31, 2001, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
Levels in Group I	
218	19,121,200 square meters.
219	85,101,905 square meters.
313	51,161,252 square meters.
314	10,131,179 square meters.
315	17,016,322 square meters.
317	47,375,063 square meters.
326	10,479,527 square meters.
334/634	171,092 dozen.
335/635	761,700 dozen.
336/636	1,089,580 dozen.
338/339	4,401,129 dozen.
340/640	2,324,008 dozen.
341	4,723,878 dozen of which not more than 2,834,325 dozen shall be in Category 341–Y [1].
342/642	1,542,444 dozen.
345	241,702 dozen.
347/348	777,632 dozen.
351/651	326,043 dozen.
363	56,499,852 numbers.
369–D [2]	1,595,943 kilograms.
369–S [3]	870,514 kilograms.
641	1,795,799 dozen.
647/648	1,042,804 dozen.
Group II	
200, 201, 220–227, 237, 239pt.[4], 300, 301, 331–333, 350, 352, 359pt.[5], 360–362, 600–604, 606 [6], 607, 611–629, 631, 633, 638, 639, 643–646, 649, 650, 652, 659pt.[7], 666, 669pt.[8], 670, 831, 833–838, 840–858 and 859pt.[9], as a group.	141,637,412 square meters equivalent.

[1] Category 341–Y: only HTS numbers 6204.22.3060, 6206.30.3010, 6206.30.3030 and 6211.42.0054.

[2] Category 369–D: only HTS numbers 6302.60.0010, 6302.91.0005 and 6302.91.0045.

[3] Category 369–S: only HTS number 6307.10.2005.

[4] Category 239pt.: only HTS number 6209.20.5040 (diapers).

[5] Category 359pt.: all HTS numbers except 6406.99.1550.

[6] Category 606: all HTS numbers except 5403.31.0040 (for administrative purposes Category 606 is designated as 606(1)).

[7] Category 659pt.: all HTS numbers except 6406.99.1510 and 6406.99.1540.

[8] Category 669pt.: all HTS numbers except 5601.10.2000, 5601.22.0090, 5607.49.3000, 5607.50.4000 and 6406.10.9040.

[9] Category 859pt.: only HTS numbers 6115.19.8040, 6117.10.6020, 6212.10.5030, 6212.10.9040, 6212.20.0030, 6212.30.0030, 6212.90.0090, 6214.10.2000 and 6214.90.0090.

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2000 shall be charged to the applicable category limits for that year (see directive dated December 10, 1999) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

In addition, effective on January 1, 2001, man-made fiber textile products in HTS 5403.31.0040 in Category 606, in Group II, produced or manufactured in India and exported during the twelve-month period beginning on January 1, 2001 and extending through December 31, 2001, shall not be subject to the Group II quota established for the 2001 period. A visa is still required for this product.

For U.S. Customs' administrative purposes, the remaining HTS numbers in Category 606 shall be designated Category 606(1) [10].

Also effective on January 1, 2001, you are directed to require, entry/entry summary procedures and you shall continue to count imports for consumption and withdrawals from warehouse for consumption of textile products in HTS number 5403.31.0040 in Category 606(2) [11], produced or manufactured in India and exported during the periods January 1, 2000 through December 31, 2000 and January 1, 2001 through December 31, 2001.

Inasmuch as these imports may later be charged against the Group II level, it is important that an accurate count be taken.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 00–32290 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–DR–F

[10] Category 606(1): all HTS numbers except 5403.31.0040 (Category 606(2)).

[11] Category 606(2): only HTS number 5403.31.0040.

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Extension of Suspension of Group II Restriction for Certain Man-Made Fiber Textile Products Produced or Manufactured in India and Request for Public Comments

December 13, 2000.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Extending suspension of the Group II restriction for certain products from India and requesting public comments.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

A document published in the **Federal Register** on December 16, 1999 (64 FR 70219) announced the extension of the suspension of the Group II restriction for rayon filament yarn in HTS number 5403.31.0040 in Category 606 from India for the period January 1, 2000 through December 31, 2000. Also see 62 FR 60826, published on November 13, 1997.

The Committee for the Implementation of Textile Agreements has decided to extend the suspension for an additional twelve-month period beginning on January 1, 2001 and extending through December 31, 2001. A visa is still required for this product.

Anyone wishing to comment or provide data or information regarding the treatment of imports in HTS number 5403.31.0040 from India or to comment on domestic production or availability of products included in HTS number 5403.31.0040 is invited to submit 10 copies of such comments or information to Richard B. Steinkamp, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230; ATTN: Becky Geiger.

Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, room H3100, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Further comments may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating to matters which constitute ''a foreign affairs function of the United States.''

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 00–32289 Filed 12–18–00; 8:45 am]

BILLING CODE 3510–DR–F

DEPARTMENT OF EDUCATION

[CFDA Nos.: 84.170; 84.200]

Graduate Assistance in Areas of National Need (GAANN) and Jacob K. Javits Fellowship Program (JKJ)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice inviting applications for new awards for fiscal year (FY) 2001; clarification.

SUMMARY: On September 11, 2000 we published in the **Federal Register** Notices Inviting Applications for New Awards for FY 2001 for the GAANN and JKJ fellowship programs. (GAANN at 65 FR 54844 and JKJ at 65 FR 54843). The notices announced that the Secretary would determine both the GAANN and JKJ fellowship stipend levels for the academic year 2001–2002 based on the level of support provided by the National Science Foundation (NSF) graduate fellowships, with adjustments as necessary to ensure that the amount would not exceed the fellow's demonstrated level of financial need.

This notice is to clarify that the Secretary will make the determination of the stipend levels for both GAANN and JKJ fellowships by using the level of the NSF stipend level for the Graduate Research Fellowship Program as of February 1, 2001.

FOR FURTHER INFORMATION CONTACT: For GAANN: Cosette H. Ryan, Graduate Assistance in Areas of National Need Program, U.S. Department of Education, 1900 K Street, NW., 6th Floor, Washington, DC 20006–8521. Telephone: (202) 502–7637. The e-mail address for the GAANN Program is: ope_gaann_program@ed.gov

For JKJ: Carolyn Proctor, Jacob K. Javits Fellowship Program, U.S. Department of Education, International Education and Graduate Programs Service, 1990 K Street, NW., Suite 6000, Washington DC 20006–8521. Telephone: (202) 502–7542. The e-mail address for the JKJ Program is: ope_javits_program@ed.gov

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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Program Authority: 20 U.S.C. 1134–1134d and 1135–1135e.

Dated: December 12, 2000.

A. Lee Fritschler,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 00–32198 Filed 12–18–00; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF EDUCATION

Web-Based Education Commission: Postponement of Press Conference

AGENCY: Office of Postsecondary Education, Education.

SUMMARY: The Commission published a notice in the **Federal Register** on December 11, 2000 (65 FR 77350), announcing a press conference to be held on December 14, 2000 at 9:30 a.m. Due to a scheduling conflict, the press conference has been rescheduled.

DATES: The press conference will be held on December 19, 2000 at 1 p.m. It will be held at the National Press Club, 529 14th St., NW., in Washington, DC, in the Hollerman Lounge.

FOR FURTHER INFORMATION CONTACT: David Byer, Executive Director, Web-based Education Commission, U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006–8533. Telephone: (202) 219–7045. Fax: (202) 502–7675. Email: *web_commission@ed.gov*.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the *Code of Federal Regulations* is available on GPO Access at: *http://www.access.gpo.gov/nara/indes.html/*.

Dated: December 14, 2000.

A. Lee Fritschler,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 00–32367 Filed 12–15–00; 10:16 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice 01–07: SciDAC—Integrated Software Infrastructure Centers

AGENCY: Department of Energy.

ACTION: Notice inviting research grant applications.

SUMMARY: The Office of Advanced Scientific Computing Research (OASCR) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announces its interest in receiving

applications for projects in the Integrated Software Infrastructure Centers (ISIC) component of the Scientific Discovery through Advanced Computing (SciDAC) research program. The software infrastructure vision of SciDAC is for a comprehensive, portable, and fully integrated suite of systems software and tools for the effective management and utilization of terascale computational resources by SciDAC applications. This infrastructure will provide maximum performance, robustness, portability and ease of use to application developers, end users, and system administrators. Successful ISIC activities must establish and maintain close interactions with other ISIC activities and SciDAC efforts, and it is essential that they address the complete software lifecycle including transition of successful research software to robust production software and appropriate mechanisms for long term software support and evolution. Partnerships among universities, national laboratories, and industry are encouraged. The full text of Program Notice 01–07 is available via the Internet using the following web site address: http://www.science.doe.gov/production/grants/grants.html.

DATES: Preapplications referencing Program Notice 01–07 should be received by January 31, 2001.

Formal applications in response to this notice should be received by 4:30 p.m., E.S.T., March 15, 2001, to be accepted for merit review and funding in FY 2001.

ADDRESSES: Preapplications referencing Program Notice 01–07 should be sent via e-mail using the following address: preapplications@er.doe.gov.

Formal applications referencing Program Notice 01–07, should be forwarded to: U.S. Department of Energy, Office of Science, Grants and Contracts Division, SC–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 01–07. This address must be used when submitting applications by U.S. Postal Service Express Mail or any commercial mail delivery service, or when hand-carried by the applicant.

FOR FURTHER INFORMATION CONTACT: Dr. Frederick C. Johnson, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290, telephone: (301) 903–5800, E-mail: fjohnson@er.doe.gov, fax: (301) 903–7774.

SUPPLEMENTARY INFORMATION:

Background

Scientific Discovery Through Advanced Computing

Advanced scientific computing will be a key contributor to scientific research in the 21st Century. Within the Office of Science (SC), scientific computing programs and facilities are already essential to progress in many areas of research critical to the nation. Major scientific challenges exist in all SC research programs that can best be addressed through advances in scientific supercomputing, *e.g.,* designing materials with selected properties, elucidating the structure and function of proteins, understanding and controlling plasma turbulence, and designing new particle accelerators. To help ensure its missions are met, SC is bringing together advanced scientific computing and scientific research in an integrated program entitled ''Scientific Discovery Through Advanced Computing.''

The Opportunity and the Challenge

Extraordinary advances in computing technology in the past decade have set the stage for a major advance in scientific computing. Within the next five to ten years, computers 1,000 times faster than today's computers will become available. These advances herald a new era in scientific computing. Using such computers, it will be possible to dramatically extend our exploration of the fundamental processes of nature (*e.g.,* the structure of matter from the most elementary particles to the building blocks of life,) as well as advance our ability to predict the behavior of a broad range of complex natural and engineered systems (*e.g.,* the earth's climate or an automobile engine).

To exploit this opportunity, these computing advances must be translated into corresponding increases in the performance of the scientific codes used to model physical, chemical, and biological systems. This is a daunting problem. Current advances in computing technology are being driven by market forces in the commercial sector, not by scientific computing. Harnessing commercial computing technology for scientific research poses problems unlike those encountered in previous supercomputers, in magnitude as well as in kind. As noted in the 1998 report [1] from the NSF/DOE ''National Workshop on Advanced Scientific Computing'' and the 1999 report [2] from the President's Information Technology Advisory Committee, this problem will only be solved by increased investments in computer software—in research and development on scientific simulation codes as well as on the mathematical and computing systems software that underlie these codes.

Investment Plan of the Office of Science

To meet the challenge posed by the new generation of terascale computers, SC will fund a set of coordinated investments as outlined in its long-range plan for scientific computing, Scientific Discovery through Advanced Computing,[3] submitted to Congress on March 30, 2000. First, it will create a Scientific Computing Software Infrastructure that bridges the gap between the advanced computing technologies being developed by the computer industry and the scientific research programs sponsored by the Office of Science. Specifically, the SC effort proposes to:

- Create a new generation of Scientific Simulation Codes that take full advantage of the extraordinary computing capabilities of terascale computers.
- Create the Mathematical and Computing Systems Software to enable the Scientific Simulation Codes to effectively and efficiently use terascale computers.
- Create a Collaboratory Software Environment to enable geographically-separated scientists to effectively work together as a team and to facilitate remote access to both facilities and data.

These activities are supported by a Scientific Computing Hardware Infrastructure that will be tailored to meet the needs of its research programs. The Hardware Infrastructure is robust, to provide the stable computing resources needed by the scientific applications; agile, to respond to innovative advances in computer technology that impact scientific computing; and flexible, to allow the most appropriate and economical resources to be used to solve each class of problems. Specifically, the SC proposes to support:

- A Flagship Computing Facility, the National Energy Research Scientific Computing Center (NERSC), to provide the robust, high-end computing resources needed by a broad range of scientific research programs.

[1] This workshop was sponsored by the National Science Foundation and the Department of Energy and hosted by the National Academy of Sciences on July 30–31, 1998. Copies of the report may be obtained from:

[2] Copies of the PITAC report may be obtained from: http://www.ccic.gov/ac/report/.

[3] Copies of the SC computing plan, Scientific Discovery through Advanced Computing, can be downloaded from SC website at: http://www.sc.doe.gov/production/octr/index.html.

• Topical Computing Facilities to provide computing resources tailored for specific scientific applications and to serve as the focal point for an application community as it strives to optimize its use of terascale computers.

• Experimental Computing Facilities to assess the promise of new computing technologies being developed by the computer industry for scientific applications.

Both sets of investments will create exciting opportunities for teams of researchers from laboratories and universities to create new revolutionary computing capabilities for scientific discovery.

The Benefits

The Scientific Computing Software Infrastructure, along with the upgrades to the hardware infrastructure, will enable laboratory and university researchers to solve the most challenging scientific problems faced by the Office of Science at a level of accuracy and detail never before achieved. These developments will have significant benefit to all of the government agencies who rely on high-performance scientific computing to achieve their mission goals as well as to the U.S. high-performance computing industry.

Background

Integrated Software Infrastructure Centers

This solicitation addresses the Mathematical and Computing Systems Software Environment element of the SciDAC Scientific Computing Software Infrastructure. ISIC envisions a comprehensive, integrated, scalable, and robust high performance software infrastructure, which overcomes difficult technical challenges to enable the effective use of terascale systems by SciDAC applications. ISIC addresses needs for: New algorithms which scale to parallel systems having thousands of processors; methodology for achieving portability and interoperability of complex high performance scientific software packages; operating systems tools and support for the effective management of terascale and beyond systems; and effective tools for feature identification, data management and visualization of petabyte-scale scientific data sets. ISIC provides the essential computing and communications infrastructure for support of SciDAC applications. The ISIC effort encompasses a multi-discipline approach with activities in:

• Algorithms, methods, and libraries—Algorithms, methods and libraries that are fully scalable to many thousands of processors with full performance portability.

• Program development environments and tools—Component-based, fully integrated, terascale program development and runtime tools, which scale effectively and provide maximum utility and ease-of-use to developers and scientific end users.

• Operating system software and tools—Systems software that scales to tens of thousands of processors, supports high performance application-level communication and provides the highest levels of fault tolerance, reliability, manageability, and ease of use for system administrators, tool developers and end users.

• Visualization and data management systems—Scalable, intuitive systems fully supportive of SciDAC application requirements for moving, storing, analyzing, querying, manipulating and visualizing multi-petabytes of scientific data and objects.

The complexity of these challenges and the strong emphasis on scalability, interoperability and portability requires novel approaches in the proposed technical research and the research management structure. ISIC emphasizes the formation of Enabling Technologies Centers (ETC) as an organizational basis for successful applications. An ETC is a virtual multi-institution, multi-disciplinary team which will:

• Create mathematical and/or computing systems software to enable scientific simulation codes to take full advantage of the extraordinary capabilities of terascale computers;

• Work closely with application teams and other SciDAC teams to ensure that the most critical computer science and applied mathematics issues are addressed in a timely and comprehensive fashion; and

• Address all aspects of the successful research software lifecycle including transition of a research code into a robust production code and long term software evolution and maintenance and end user support.

Solicitation Emphasis

This notice is one of several that addresses the initial requirements of the SciDAC program. The focus is on four topics: (1) Algorithms, methods and libraries; (2) program development environments and tools; (3) operating systems software and tools; and (4) visualization and data management. Responses to this notice may propose work in one or more of these areas and may be single institution efforts or partnerships that involve many organizations. It is expected that most, if not all, of the proposed activities will be organized as ETCs. Specific areas of interest include, but are not limited to, the following examples listed for each subtopic:

(1) Algorithms, Methods and Mathematical Libraries

(a) *Mesh generation and discretization technology.* Tools to facilitate the generation and partitioning of all types of meshes (structured, unstructured, and chimera (overlapping)) designed for many thousands of processors.

(b) *Mathematical analysis and scalable numerical algorithms.* Mathematical methods to help SciDAC applications achieve high performance on hierarchical memory terascale computers such as multiscale analysis, multilevel methods, and fast transforms capable of spanning multiple spatial and temporal scales. Resultant algorithms must be deployed in component-based mathematical software and made available to a broad range of DOE mission areas.

(2) Program Development Environment and Tools

(a) *High Performance Component Architectures.* Component technology that builds upon and extends commercial component architectures to support high performance parallel components, low-latency, high bandwidth communication among components, and efficient data and work redistribution.

(b) *Code Design and Development Tools.* Scaling methodology to deploy existing parallel code development environments on multi-teraflops SciDAC systems. Support for multi-language applications including C, C++, UPC, Fortran, Co-Array Fortran, Python and Java; parallel programming libraries, such as MPI, OpenMP, thread libraries, the Global Array library; and multi-level hierarchical memory programming models.

(c) *Code Correctness and Validation.* Debugging tools that implement emerging community standards in parallel debuggers and automated data dependency analysis. Relative debugging methodology for comparing at run time the execution of two versions of a code.

(d) *Performance Tools.* Evaluation of existing research and commercial performance analysis tools, both tracefile-based and dynamic, for scalability and suitability for SciDAC applications. Performance metrics and benchmarks which enable reliable and credible performance predictions of application codes on terascale and

larger systems. Tools which link hardware counters to meaningful terascale system performance characteristics and application performance.

(2) Operating System Software and Tools

(a) *Terascale System Resource Management.* Modular infrastructure for resource management on terascale clusters including resource scheduling, meta-scheduling, node daemon support, comprehensive usage accounting and user interfaces that also emphasizes portability to terascale vendor operating systems.

(b) *Terascale System Support.* Scalable checkpointing and improved runtime steering for early deployment. Methodology for analyzing tradeoffs between fault tolerance and peak performance. Support for robust runtime job management and I/O systems that are tolerant of component failure. Scalable tools for system administration including initial system boot, system updates, job launch and system utilities.

(c) *High Performance Communication.* Operating system support for application level communication which scales to thousands of processors, provides minimum latency and maximum bandwidth between parallel application processes. Innovative approaches to terascale operating system architectures including non-uniform kernel support for computational, service, interactive and i/o nodes.

(4) Visualization and Data Management

(a) *Data Management Systems.* Data exchange methods and standardizations that facilitate collaborative applications. Innovative Database Management Systems (DBMS) approaches for high throughput parallel I/O and complex queries of large scientific databases. Hierarchical data storage systems involving tertiary storage media that are sequential. Agent methodology for feature extraction and complex query operations. Tools for user-driven and automatic clustering, reclustering or replication of objects to maximize retrieval efficiency. Collaborations with the DBMS and tertiary storage vendor industry are encouraged.

(b) *Visualization.* Vector/tensor field visualization in 3–D. Modes of visualization for interpretation and understanding of large datasets. Remote and collaborative visualization methods. Characterization of simulation, experimental and visualization errors/uncertainties. Adaptive, multiresolution, parallel and scalable visualization algorithms. Innovative techniques for exploring multi-dimensional, multi-discipline data sets.

Collaborations with the high performance hardware and software vendor industry are encouraged wherever appropriate.

Integration of Software Components and Tools

Responses to this notice should cover the full range of activities from basic research to development of software that can be deployed to the SciDAC applications communities. It is critical that these submissions demonstrate effective strategies for coupling with requirements from applications researchers and ensuring that software developed will interoperate with software developed by other ISIC activities and be effectively deployed to SciDAC computing facilities and applications groups.

ISIC envisions a fully integrated software environment that provides both robustness and ease of use to the end user application scientist. Implementation of this vision will be coordinated through a participatory management process with input from ISIC teams and other key participants of SciDAC. As component and tool implementations mature, each team will be expected to develop the necessary technology to fully and smoothly incorporate their software tools into the ISIC environment.

ISIC activities play a critical cross-cutting role in the SciDAC. ISIC goals require significant interactions, ranging from the joint development and deployment of tools and technologies into the applications community, to the incorporation of needed capabilities into new products and systems. ISIC researchers will need to interact closely with diverse groups including: applications scientists, vendor providers, the DOE ASCI program, and other federal agency programs addressing complementary goals. To support and facilitate the maximum impact of the SciDAC Scientific Computing Software Infrastructure, high emphasis will be placed on ensuring that source code is fully and freely available for use and modification throughout the scientific computing community.

This solicitation is focused on larger ETC efforts in support of the SciDAC program. Applications to the OASCR base program through the Continuing Solicitation for all Office of Science Programs Notice 01–01, found at *http://www.science.doe.gov/production/grants/grants.html,* which may have the potential for contributing to the ISIC software infrastructure, should so indicate.

Collaboration

Applicants are encouraged to collaborate with researchers in other institutions, such as: universities, industry, non-profit organizations, federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to include cost sharing wherever feasible. Additional information on collaboration is available in the Application Guide for the Office of Science Financial Assistance Program that is available via the Internet at: http://www.sc.doe.gov/production/grants/Colab.html.

Program Funding

It is anticipated that up to $7 million annually will be available for multiple awards for these components of the ISIC program. Initial awards will be made in FY 2001 in the categories described above, and applications may request project support for up to five years. All awards are contingent on the availability of funds, research progress, and programmatic needs. Annual budgets for successful ISIC projects are expected to range from $2,000,000 to $4,000,000 per project. Annual budgets may increase in the out-years but should remain within the overall annual maximum guidance. Any proposed effort that exceeds the annual maximum in the out-years should be separately identified for potential award increases if additional funds become available.

Preapplications

Preapplications are strongly encouraged but not required prior to submission of a full application. However, notification of a successful preapplication is not an indication that an award will be made in response to the formal application. The preapplication should identify on the cover sheet the institution, Principal Investigator name(s), address(s), telephone, and fax number(s) and E-mail address(es), title of the project, and the field of scientific research. A brief (one-page) vitae should be provided for each Principal Investigator. The preapplication should consist of a two to three page narrative describing the research project objectives, the approach to be taken, and a description of any research partnerships. Preapplications will be reviewed by DOE relative to the scope and research needs of the ISIC program.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria listed in descending order of importance as codified at 10 CFR 605.10(d):

1. Scientific and/or Technical Merit of the Project,

2. Appropriateness of the Proposed Method or Approach,

3. Competency of Applicant's Personnel and Adequacy of Proposed Resources,

4. Reasonableness and Appropriateness of the Proposed Budget.

The evaluation of applications under item 1, Scientific and Technical Merit, will pay particular attention to:

(a) The potential of the proposed project to make a significant impact in the effectiveness of SciDAC applications researchers;

(b) The demonstrated capabilities of the applicants to perform basic research related to ISIC and transform these research results into software that can be widely deployed;

(c) The likelihood that the algorithms, methods, mathematical libraries, and software components that result from this effort will have impact on science disciplines outside of the SciDAC applications projects;

(d) Identification and approach to software integration and long term support issues, including component technology, documentation, test cases, tutorials, end user training, and quality maintenance and evolution.

The evaluation under item 2, Appropriateness of the Proposed Method or Approach, will also consider the following elements related to Quality of Planning:

(a) Quality of the plan for effective coupling to applications researchers;

(b) Quality of plan for ensuring interoperability and integration with software produced by other ISIC and SciDAC efforts;

(b) Viability of plan for deployment of software to SciDAC facilities and applications groups;

(c) Knowledge of and coupling to other efforts in high performance scientific computing software such as the DOE ACTS program, the DOE ASCI program and the NSF ITR program;

(d) Quality and clarity of proposed work schedule and deliverables.

Note that external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers may be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution. Reviewers will be selected to represent expertise in the technology areas proposed, applications groups that are potential users of the technology, and related programs in other Federal Agencies or parts of DOE, such as the Advanced Strategic Computing Initiative (ASCI) within DOE's National Nuclear Security Administration.

Information about the development and submission of applications, eligibility, limitations, evaluation, selection process, and other policies and procedures including detailed procedures for submitting proposals from multi-institution partnerships may be found in 10 CFR part 605, and in the Application Guide for the Office of Science Financial Assistance Program. Electronic access to the Guide and required forms is made available via the World Wide Web at: *http://www.science.doe.gov/production/grants/grants.html.* The Project Description must be 20 pages or less, including tables and figures, but exclusive of attachments. The application must contain an abstract or project summary, letters of intent from collaborators, and short vitae.

The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR part 605.

Issued in Washington, D.C. on December 7, 2000.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 00–32250 Filed 12–18–00; 8:45 am]

BILLING CODE 6450–01–U

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice 01–06: Scientific Discovery Through Advanced Computing: National Collaboratories and High Performance Networks

AGENCY: U.S. Department of Energy.

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Advanced Scientific Computing Research (ASCR) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announces its interest in receiving applications for grants in support of the National Collaboratories and High Performance Networks Programs, which include scope supportive of the Scientific Discovery through Advanced Computing Initiative. Collaboratories link geographically dispersed researchers, data, and tools via high performance networks to enable remote access to facilities, access to large datasets, shared environments, and ease of collaboration. This announcement is focused on research and development to support DOE-specific activities in three areas: (1) High performance middleware services that include, but are not limited to, software to allow applications to adapt to changing network conditions and software that provides ease of collaboration for distributed teams; (2) innovative, high performance network research that includes, but is not limited to, high performance transport protocols, network measurement and analysis, and traffic engineering tools and services which are focused on improving the end-to-end performance for data intensive scientific applications; and (3) collaboratories to test and validate the enabling technologies for discipline-specific applications. Collaborations across organizations that include networking researchers, middleware developers and discipline-specific scientists are encouraged. The full text of Program Notice 01–06 is available via the Internet using the following web site address: *http://www.science.doe.gov/production/grants/grants.html.*

DATES: Preapplications referencing Program Notice 01–06 should be received by January 31, 2001. Formal applications in response to this notice should be received by 4:30 p.m., E.S.T., March 15, 2001, to be accepted for merit review and funding in FY 2001.

ADDRESSES: Preapplications referencing Program Notice 01–06 should be sent via e-mail using the following address: preapplications@er.doe.gov. Formal applications referencing Program Notice 01–06, should be forwarded to: U.S. Department of Energy, Office of Science, Grants and Contracts Division, SC–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 01–06. This address must be used when submitting applications by U.S. Postal Service Express Mail or any commercial mail delivery service, or when hand-carried by the applicant.

FOR FURTHER INFORMATION CONTACT: For further information on this notice contact: National Collaboratories: Dr. Mary Anne Scott, Office of Advanced Scientific Computing Research, SC–31, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290, telephone: (301) 903–6368, e-mail: scott@er.doe.gov.

High Performance Networks: Dr. Thomas D. Ndousse, Office of Advanced Scientific Computing Research, SC–31,

Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290, telephone: (301) 903–9960, e-mail: *tndousse@er.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background: Scientific Discovery Through Advanced Computing

Advanced scientific computing will be a key contributor to scientific research in the 21st Century. Within the Office of Science (SC), scientific computing programs and facilities are already essential to progress in many areas of research critical to the nation. Major scientific challenges exist in all SC research programs that can best be addressed through advances in scientific supercomputing—designing materials with selected properties, elucidating the structure and function of proteins, understanding and controlling plasma turbulence, and designing new particle accelerators. To help ensure its missions are met, SC is bringing together advanced scientific computing and scientific research in an integrated program entitled ''Scientific Discovery Through Advanced Computing.''

The Opportunity and the Challenge

Extraordinary advances in computing technology in the past decade have set the stage for a major advance in scientific computing. Within the next five to ten years, computers that are 1,000 times faster than today's computers will become available. These advances herald a new era in scientific computing. Using such computers, it will be possible to dramatically extend our exploration of the fundamental processes of nature (*e.g.,* the structure of matter from the most elementary particles to the building blocks of life) as well as advance our ability to predict the behavior of a broad range of complex natural and engineered systems (*e.g.,* the earth's climate or an automobile engine).

To exploit this opportunity, these computing advances must be translated into corresponding increases in the performance of the scientific codes used to model physical, chemical, and biological systems. This is a daunting problem. Current advances in computing technology are being driven by market forces in the commercial sector, not by scientific computing. Harnessing commercial computing technology for scientific research poses problems unlike those encountered in previous supercomputers, in magnitude as well as in kind. As noted in the 1998 report[1] from the NSF/DOE ''National Workshop on Advanced Scientific Computing'' and the 1999 report[2] from the President's Information Technology Advisory Committee, this problem will only be solved by increasing investments in computer software—in research and development on scientific simulation codes as well as on the mathematical and computing systems software that underlie these codes.

Investment Plan of the Office of Science

To meet the challenge posed by the new generation of terascale computers, SC will fund a set of coordinated investments as outlined in the long plan for scientific computing, Scientific Discovery through Advanced Computing,[3] submitted to Congress on March 30, 2000. First, it will create a Scientific Computing Software Infrastructure that bridges the gap between the advanced computing technologies being developed by the computer industry and the scientific research programs sponsored by the Office of Science. Specifically, the SC effort proposes to:

- Create a new generation of Scientific Simulation Codes that take full advantage of the extraordinary computing capabilities of terascale computers.
- Create the Mathematical and Computing Systems Software to enable the Scientific Simulation Codes to effectively and efficiently use terascale computers.
- Create a Collaboratory Software Environment to enable geographically separated scientists to effectively work together as a team and to facilitate remote access to both facilities and data.

These activities will be supported by a Scientific Computing Hardware Infrastructure that has been tailored to meet the needs of its research programs. The Hardware Infrastructure is robust, to provide the stable computing resources needed by the scientific applications; agile, to respond to innovative advances in computer technology that impact scientific computing; and flexible, to allow the most appropriate and economical resources to be used to solve each class of problems. Specifically, the SC proposes to support:

- A Flagship Computing Facility, the National Energy Research Scientific Computing Center (NERSC), to provide the robust, high-end computing resources needed by a broad range of scientific research programs.
- Topical Computing Facilities to provide computing resources tailored for specific scientific applications and to serve as the focal point for an application community as it strives to optimize its use of terascale computers.
- Experimental Computing Facilities to assess the promise of new computing technologies being developed by the computer industry for scientific applications.

Both sets of investments will create exciting opportunities for teams of researchers from laboratories and universities to create new revolutionary computing capabilities for scientific discovery.

The Benefits

The Scientific Computing Software Infrastructure, along with the upgrades to the hardware infrastructure, will enable laboratory and university researchers to solve the most challenging scientific problems faced by the Office of Science at a level of accuracy and detail never before achieved. These developments will have significant benefit to all of the government agencies who rely on high-performance scientific computing to achieve their mission goals as well as to the U.S. high-performance computing industry.

Background: National Collaboratories and High Performance Networks

The current core programs in ASCR are intended to enhance the Department's ability to satisfy mission requirements through advanced technologies such as distributed computing, national collaboratories, high performance networks, remote access to facilities, and remote access to petabyte-scale datasets with complex internal structure. Within this context, the National Collaboratories and High Performance Networks Programs provide a coordinated program of technology research and development that leverages the strengths of computer and computational science research programs and partners with science application pilot projects. Likewise, these programs support the Scientific Discovery through Advanced Computing by enabling integration of multi-institutional, geographically-dispersed researcher into effective, efficient teams and by providing

[1] This workshop was sponsored by the National Science Foundation and the Department of Energy and hosted by the National Academy of Sciences on July 30–31, 1998. Copies of the report may be obtained from: http://www.er.doe.gov/production/octri/mics/index.html

[2] Copies of the PITAC report may be obtained from: *http://www.ccic.gov/ac/report/.*

[3] Copies of the SC computing plan, Scientific Discovery through Advanced Computing, can be downloaded from the SC web site at: http://www.sc.doe.gov/production/octr/index.html.

distributed computing environments and tools to support the use of remote computers and access to data and facilities.

Advances in high performance network capabilities and collaboration technologies are making it easier for large geographically dispersed teams to collaborate effectively. This is especially important for the teams using the major computational resources, data resources, and experimental facilities supported by DOE. With leadership from DOE, these geographically distributed laboratories or collaboratories have begun to play an important role in the Nation's scientific enterprise. The importance of collaboratories is expected to increase in the future. However, significant research questions must be addressed if collaboratories are to achieve their potential: namely, to enable remote access facilities that produce petabytes/year; to provide remote users an experience that approaches the same as ''being there;'' to provide remote visualization of terabyte to petabyte data sets from computational simulation; and to enable effective remote access to advanced scientific computers.

Solving the challenging network and distributed computing problems calls for new modalities of scientific research. Many scientific applications when deployed on existing networks fail to meet the end-to-end expectations for performance. This is especially true for distributed high-end applications such as remote visualization and high capacity data transfer. Recent advances in optical networks brought about by Dense Wave Division Multiplexing (DWDM) are resulting in unprecedented increases for bandwidth in the core networks. However, many challenging protocol engineering, traffic engineering, and high-performance middleware problems must be addressed before complex scientific high-end applications and collaboratories can benefit from this increase in bandwidth. Harnessing this bandwidth at the application level poses some important and challenging problems.

Research is needed to understand what services collaboratories require and how these services should be integrated with the large number of network devices and network-attached devices that must work together. Examples of the components and services that need to be integrated include: data archives on tape, high performance disk caches, visualization and data analysis servers, authentication and security services, directory services, network resources, and computational systems including the computer on a scientist's desk. All of these physical and software services must be tied together by common software framework building blocks or ''middleware'' to enable the collaboratories of the future to succeed.

Further, at the network level, research is needed for advanced services to develop advanced network services and tools to deliver high end-to-end performance to distributed scientific applications. There are several areas that can contribute to improving the end-to-end performance for secure multi-gigabits/sec transport that some of DOE's advanced scientific applications require. These include: enhancement of existing transport protocols, the development of accurate measurement and analysis techniques, and the network services that can provide online performance predictions.

These challenges will be addressed through an integrated program of fundamental research in high performance networking and collaboratory technologies in partnership with key scientific disciplines that provide the applications—the research may be focused for short-term results (within three years) or long term (five-years and greater). This announcement seeks applications in three areas:

1. Middleware: research and development projects that will address individual technology elements to enable universal, ubiquitous, easy access to remote resources or that will contribute to the ease with which distributed teams work together. Enabling high performance for scientific applications is an important consideration.

2. Collaboratory Pilots: research and development of enabling technologies that is integrated with and required by distributed scientific applications. An example of such a distributed application is the real-time data acquisition, reduction and visualization for macromolecular crystallography using a high intensity X-ray light source facility remotely. Another distributed application could be an extensive network measurement and analysis infrastructure employed to diagnose and predict end-to-end performance.

3. High Performance Network Engineering: research, development, and testing of advanced network protocols, traffic engineering, and network services that can significantly improve capabilities, end-to-end performance, and controllability of networks infrastructures designed to support distributed scientific applications.

To the extent that software and/or infrastructure development is involved, all applications to this notice should address the issues that characterize a successful research lifecycle. That is, technology transfer strategies should be provided for the transition of research code and/or infrastructure into robust production. Long term software evolution and maintenance and end user support should also be considered.

Integration of work efforts across all projects funded under this notice will occur following the awards, to preclude duplication of effort and to maximize leveraging and coordination. Projects are expected to work closely with other SciDAC teams, where identified during this integration. Coordination through a participatory management process will continue for the life of the projects. (See *http://doecollaboratory.pnl.gov/* for a list of currently funded projects in National Collaboratories and background of the program that began as the DOE 2000 Initiative.) (See *http://www.er.doe.gov/production/octr/mics/network—research.htm.* For background on the High Performance Networks Program.)

Solicitation Emphasis Areas

1. Middleware technology research and development projects are to have certain characteristics. Products of this research and development are expected to provide services that interoperate and feature common interfaces. It should be easy to learn and use the tools. Applications in response to this notice should delineate an effective strategy for coupling with requirements from the scientific applications of the potential collaboratories. Applications in response to this notice should also provide a plan for software maintenance and support.

Middleware technology research and development projects that enable collaboration may focus on providing a broad set of tools or toolkits to support, but are not limited to, the following areas of interest:

- Collaborative Visualization.
- Collaborative Problem Solving Environments.
- Real-time Analysis.
- Group Collaboration.
- Data Management.
- Science Portals.
- On-line Instrumentation.
- Data Grids.

In addition, middleware technology research and development projects may address standard services and protocols that are needed to enable persistent, universal, and ubiquitous access to networked resources, such as, but are not limited to, the following:

- Directory Services.
- Authentication/Authorization Services.
- Co-scheduling Distributed Resources.
- Multicast and efficient broadcast capabilities.
- Automatic resource discovery protocols.
- Remote data access services.
- Network-attached memory and storage systems.
- Communications services.

For middleware technology research and development projects, it is estimated that between four and eight awards could be made in FY 2001, contingent upon the availability of appropriated funds. The scope of a single-focus project is expected to range from $150K to $500K.

Collaboratory pilots should have certain characteristics. The project should:

- Address a problem of national scientific or engineering significance clearly related to the mission of DOE and have high visibility.
- Involve geographically separated groups of personnel and/or facilities that are inherently required to collaborate or be used remotely for success of the project.

The project may:

- Focus on developing and providing a set of middleware services needed by a broad set of applications requiring distributed computing capabilities.
- Focus solely on advanced network development and testing such as a measurement and analysis infrastructure to accurately measure, calibrate, diagnose performance related problems, and predict the end-to-end performance of operational high-speed networks.

All responses to this notice must provide a plan for transition to sustaining activities and services for end users on completion of the project. The scope of a collaboratory pilot is expected to be about $0.5M to $2.5M total per year. This is the total for all the institutions participating and it is expected that a single institution would be funded at a level of no more than $600K. It is estimated that three to five awards will be made for this area during FY 2001.

It is also possible for middleware technology research and development projects and/or collaboratory pilots to address an element for evaluating systems and their impact on the process of science, namely identifying factors that facilitate or impede the adoption of technology.

2. High Performance Network Engineering is key to the DOE vision of collaborative scientific research environments in which geographically distributed research teams and computing resources are interconnected to form a virtual computing research environment. Emerging high-end scientific applications, when deployed on existing networks, fail to meet the expected end-to-end performance, latency, security, and guaranteed quality of service required for complex scientific investigations. The high-performance network program addresses these challenges in the current announcement by focusing in three major research areas of high performance network engineering:

- Network Measurement and Analysis: Focuses on the fundamental issues of end-to-end performance through measurement and analysis.
- High-performance Transport Protocols: Addresses the performance and security enhancement issues of traditional protocols operating in high-speed, high-performance networks.
- Advanced Traffic Engineering Tools And Services: Deals with advanced tools and service for managing, differentiating, and controlling network traffic in order to satisfy the end-to-end performance objectives.

(a) Network Measurement and Analysis: Applications may address innovative scalable network measurement and analysis infrastructures, tools, services, etc., that can be used to accurately measure, calibrate, diagnose performance related problems, and predict the end-to-end performance of operational high-speed network networks. This may involve passive and active measurement, SNMP derived data, or a combination and may include, but not be limited to, the following:

- Bandwidth estimation techniques for high-speed links (OC–12, OC–48).
- Measurement infrastructures to collect, store, and analyze traffic traces.
- Distributed agent architecture for network measurement and analysis.
- On-line analysis and data mining of measured data.
- Dynamic end-to-end path selection based on online analysis.
- Measurement and calibration of transport protocol performance.

Applications focusing on measurement and analysis infrastructures are expected to work in close collaboration with DOE's Energy Science Network (ESnet) in the deployment measurement facilities. A network research testbed facility has been established, with the cooperation of ESnet, for experimental network research activities. Researchers requiring the use of this experimental facility are encouraged to work closely with the ESnet Research Support Subcommittee (ESRSC) chartered to coordinate the activities of the testbed. A complete description of this experimental facility can be found at *http://www.es.net.*

(b) High-Performance Transport Protocols: The performance expectation for the delivery of multi-gigabits/sec throughput to distributed scientific applications far exceeds the capability of current networks. This performance expectation raises some fundamental questions concerning the capability of conventional routing protocols optimized for low-speed, best-effort traffic. The current announcement addresses transport protocol performance issues by seeking innovative approaches that may include but are not be limited to the following:

- Transport protocol measurement, tuning, and calibration tools.
- Adaptive extensions of transport protocols for high-speed networks.
- High-performance network traffic characterization.
- Transport protocol parallelization at high-speed.

The objective is to reduce the contribution of transport protocol on end-to-end congestion. Potential applications must provide a sound mathematical analysis of the proposed enhancements when subjected to high-end scientific applications that potentially exercise its important features.

(c) Advanced Traffic Engineering Tools and Services: Addresses the resource and performance optimization of high-performance and high-speed networks, including advanced traffic management and control strategies, services, and tools that can be used for traffic differentiation and for steering traffic. Applications may focus on, but are not limited to, the following:

- QoS-based routing and source routing.
- Dynamic routing and traffic control.
- Congestion notification and avoidance.
- Bandwidth brokering services.
- Advanced traffic management tools and services.
- Simulation of large traffic flows.

Applications addressing these and other related issues should concentrate on those activities that lead to a significant improvement in end-to-end performance of applications running across high performance networks.

The high-performance network research program anticipates funding projects in these three areas in FY 2001. It should also be noted that a collaboratory pilot (as discussed under

section 2.) may focus solely on advanced network development and testing such as a measurement and analysis infrastructure to accurately measure, calibrate, diagnose performance related problems, and predict the end-to-end performance of operational high-speed networks. The scope of a single project is expected to range from $150K to $500K.

Preapplications

Potential applicants are strongly encouraged to submit a brief preapplication that consists of two to three pages of narrative describing the research objectives and technical approach(s). Preapplications will be reviewed relative to the scope and research needs of the ASCR National Collaboratories and High Performance Networks Programs, as outlined in the summary paragraph and in the **SUPPLEMENTARY INFORMATION.** The preapplication should identify, on the cover sheet, the title of the project, the institution, principal investigator name, telephone, fax, and e-mail address. The focus element (Middleware Technology, Collaboratory Pilots, or High Performance Network Engineering) for the preapplication should also be clearly identified. A response to each preapplication discussing the potential programmatic relevance of a formal application will be communicated to the Principal Investigator within 7 to 14 days of receipt.

Collaboration

Applicants are encouraged to collaborate with researchers in other institutions, such as: universities, industry, non-profit organizations, federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to include cost sharing wherever feasible. Additional information on collaboration is available in the Application Guide for the Office of Science Financial Assistance Program that is available via the Internet at: http://www.sc.doe.gov/production/grants/Colab.html.

Program Funding

It is anticipated that up to $6 million will be available for all National Collaboratories and High Performance Networks Programs awards in Fiscal Year 2001; from ten to as many as fifteen awards are anticipated, contingent on availability of appropriated funds in FY 2001 and the size of the awards. Multiple year funding is expected, also contingent on availability of funds and progress of the research.

Awards are expected to be at most $500,000 per year for individual middleware technology and network engineering R&D projects. Awards for collaboratory pilots are expected to be at most $2.5 million per year. Since pilots are expected to be multi-institution projects, awards under this notice would range from $200,000 to $600,000 for participation in a pilot. The term for projects can be from one to three years.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria, which are listed in descending order of importance codified at 10 CFR 605.10(d):

(1) Scientific and/or Technical Merit of the Project;

(2) Appropriateness of the Proposed Method or Approach;

(3) Competency of Applicant's Personnel and Adequacy of Proposed Resources;

(4) Reasonableness and Appropriateness of the Proposed Budget.

The evaluation under item 1, Scientific and/or Technical Merit of the Project, will also consider the following elements:

(a) The potential of the proposed project to make a significant impact in the effectiveness of SciDAC applications researchers.

(b) The degree to which an application area can benefit from collaborative technology.

(c) The extent to which the project will test important collaborative technologies.

(d) The extent to which the results of the project are extensible to other program or discipline areas.

The evaluation under item 2, Appropriateness of the Proposed Method or Approach, will also consider the following elements:

(a) The degree to which the project adheres to the management philosophy of incorporating collaboration into the project execution.

(b) The quality of the plan for ensuring interoperability and integration with software produced by other SciDAC efforts.

(c) The extent to which the project incorporates broad community (industry/academia/other federal programs) interaction.

(d) Quality and clarity of proposed work schedule and deliverables.

(e) Knowledge of and coupling to previous efforts for collaborative technologies such as DOE 2000.

The evaluation will include program policy factors such as the relevance of the proposed research to the terms of the announcement and the agency's programmatic needs. Note, external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

Submission Information

The Project Description must be 20 pages or less, exclusive of attachments. It must contain an abstract or project summary on a separate page with the name of the applicant, mailing address, phone, FAX and E-mail listed. The application must include letters of intent from collaborators (briefly describing the intended contribution of each to the research), and short curriculum vitaes for the applicant and any co-PIs.

To provide a consistent format for the submission, review and solicitation of grant applications submitted under this notice, the preparation and submission of grant applications must follow the guidelines given in the Application Guide for the Office of Science Financial Assistance Program, 10 CFR Part 605. Access to SC's Financial Assistance Application Guide is possible via the World Wide Web at: *http://www.science.doe.gov/production/grants/grants.html.*

The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, DC on: December 7, 2000.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 00–32251 Filed 12–18–00; 8:45 am]

BILLING CODE 6450–01–U

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–45–000]

Colorado Interstate Gas Company; Notice of Application

December 13, 2000.

On December 4, 2000, Colorado Interstate Gas Company (CIG), P.O. Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP01–45–000 an application pursuant to Section 7 of

the Natural Gas Act (NGA) and the Commission's Rules and Regulations for a certificate of public convenience and necessity authorizing CIG to construct, own, operate, and maintain facilities in order to provide new transportation capacity to transport fuel for electric generation and for local gas distribution system supply, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may be viewed at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

Specifically, Tuscarora proposes to construct and operate:

- Approximately 35.1 miles of 24-inch diameter pipeline and appurtenant facilities which will begin at CIG's existing Ault Meter Station in Section 4, Township 7 North, Range 66 West, Weld County, Colorado and extend southward and parallel with CIG's existing pipeline, terminating at the Fort Lupton Compressor Station in Section 34, Township 2 North, Range 66 West, Weld County, Colorado.
- Two new 2,225 horsepower (ISO rated) natural gas fired reciprocating compressor units and appurtenant facilities at the Fort Lupton Compressor Station in Section 34, Township 2 North, Range 66 West, Weld County, Colorado.
- Approximately 84 miles of 20-inch diameter pipeline and appurtenant facilities which will begin at the Watkins Station in Section 31 township 3 South, Range 65 West, Weld County, Colorado and extend southward and parallel with CIG's existing Valley Line to CIG's Nixon Lateral in Section 25, Township 16 South, Range 65 West, El Paso County Colorado.

CIG estimates that the proposed facilities will cost $72,138,900 and CIG proposes to roll-in these costs into its existing rates. CIG has entered into firm contracts and precedent agreements for 282,000 dth per day of capacity to be created by the proposed expansion.

Questions regarding the details of this proposed project should be directed to James R. West, Manager, Certificates, Colorado Interstate Gas Company, P.O. Box 1087, Colorado Springs, Colorado 80944, call (719) 520–4613.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before January 3, 2001, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. For example, the Commission considers the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying a certificate will be issued.

David P. Boergers,

Secretary.

[FR Doc. 00–32265 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–389–016]

Columbia Gulf Transmission Company; Notice of Negotiated Rate Filing

December 13, 2000.

Take notice that on December 6, 2000, Columbia Gulf Transmission Company (Columbia Gulf) tendered for filing the following Agreement to a recently filed negotiated rate transaction:

ITS–2 Service Agreement No. 70083 between Columbia Gulf Transmission Company and Exxon Mobil Corporation dated November 30, 2000

Transportation service which was scheduled to commence December 2, 2000.

Columbia Gulf states that copies of the filing have been served on all parties on the official service list created by the Secretary in the proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission is determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party

must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http: //www.ferc.fed.us/efi/doorbeel.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32269 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–383–016]

Dominion Transmission, Inc; Notice of Negotiated Rate

December 13, 2000.

Take notice that on December 6, 2000, in compliance with the Commission's Letter Order, in Docket No. RP96–383–012, Dominion Transmission Inc. (DTI) tendered for filing a negotiated rate agreement for FT service between DTI and Allegheny Energy Unit 1 and 2, L.L.C. (Allegheny), together with an explanation of the contractual rights and obligations under that agreement (November 2000 FT Agreement).

DTI states that Exhibit A to the November 2000 FT Agreement clarifies that the maximum quantities of gas that DTI shall deliver and that Customer may tender are a MDTQ of 25,000 Dt and a MATQ of 9,125,000 DT. DTI notes that these figures are the same as the contract quantities specified on Second Revised Sheet No. 1404, thus alleviating the Commission's concern. he contract exhibit also clarifies that DTI's obligation is a fixed daily and annual contract maximum quantity entitlement and that DTI is not obligated in any way to provide service at an unstated ''full requirements'' level.

DTI states that copies of its letter of transmittal and enclosures have been served upon the parties to this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us./efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32270 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–184–000]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

December 13, 2000.

Take notice that on December 11, 2000, El Paso Natural Gas Company (El Paso) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1–A, Substitute Eighth Revised Sheet No. 29, with an effective date of January 1, 2001.

El Paso states that the tendered sheet revises the fuel charge applicable to transportation service on El Paso's system. The proposed fuel changes include removal of the fuel costs attributable to the Waha facilities that are the subject of the abandonment application at Docket No. CP00–437–000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http:/ /www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32266 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL01–19–000]

H.Q. Energy Services (U.S.), Inc. Complainant v. New York Independent System Operator, Inc. Respondent; Notice of Complaint

December 13, 2000.

Take notice that, on December 12, 2000, H.Q. Energy Services (U.S.), Inc. (HQUS) submitted for filing a Complaint against the New York Independent System Operator (NYISO), requesting that the Commission order the NYISO to restore the original market clearing prices for energy on May 8, 2000.

HQUS states that it has served a copy of the filing on the NYISO.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests must be filed on or before January 2, 2001. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may also be viewed on the Internet at http:/ /www.ferc.fed.us/online/rims.htm (call 202–208–2222) for assistance. Answers to the complaint shall also be due on or before January 2, 2001. Comments and

protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 00–32264 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR01–3–000]

Magnolia Pipeline Corporation; Notice of Petition for Rate Approval

December 13, 2000.

Take notice that on November 13, 2000, Magnolia Pipeline Corporation (Magnolia), filed a petition for rate approval, pursuant to Section 311 of the Natural Gas Policy Act (NGPA), and Section 284.123(b)(2) of the Commission's Regulations requesting that the Commission approve Magnolia's continued use of its current maximum rate of $0.1621 per Dth, plus reimbursement of actual fuel use up to three percent, for Section 311 interruptible transportation services performed on Magnolia's system.

Magnolia is an intrastate pipeline within the meaning of Section 2(16) of the NGPA, and owns and operates facilities within the State of Alabama. Magnolia states that even if it were able to collect its current maximum rate, it would not recover its total cost of service because its throughput is significantly lower than expected. Further, since market conditions do not allow it to collect its current maximum rate, Magnolia is seeking only to re-justify such rate. Magnolia proposes an effective date of November 21, 2000, while reserving the right to increase its Section 311 rate at a future date.

Pursuant to section 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date of Magnolia's Petition, Magnolia's rates for firm and interruptible storage services will be deemed to be fair and equitable. The Commission may within such 150 day period extend the time for action or institute a proceeding in which all interested parties will be afforded an opportunity for written comments and the oral presentation of views, data and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All motions must be filed with the Secretary of the Commission on or before December 28, 2000. This petition for rate approval is on file with the Commission and is available for public inspection. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.200(a)(1)(iii) and the instruction on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers.

Secretary.

[FR Doc. 00–32268 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–5–002]

Mid Louisiana Gas Company; Notice of Compliance Filing

December 13, 2000.

Take notice that on December 6, 2000, Mid Louisiana Gas Company filed under protest the following revised tariff sheets to comply with the Commission's November 21, 2000, Letter Order herein relative MidLa's earlier, Order No. 587–L compliance filing. As mandated by such Letter Order and Order No. 587–L, the revised tariff sheets are to be effective as of November 1, 2000.

Sub Fourth Revised Sheet No. 135
Original Sheet No. 135A
Original Sheet No. 135B
Original Sheet No. 136, and
Original Sheet No. 137.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceedings. Copies of this filing are on file with the commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32272 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–4–002]

Midcoast Interstate Transmission, Inc.; Notice of Compliance Filing

December 13, 2000.

Take notice that on December 6, 2000, Midcoast Interstate Transmission, Inc. (MIT) filed under protest the following revised tariff sheets to comply with the Commission's November 21, 2000, Letter Order herein relative MIT's earlier, Order No. 587–L, compliance filing. As mandated by the Commission's Letter Order and Order No. 587–L, the revised tariff sheets are to be effective as of November 1, 2000.

Sub Third Revised Sheet No. 85
Original Sheet No. 85A
Original Sheet No. 85B, and
Original Sheet No. 85C.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the

Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32271 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM00–1–25–005]

Mississippi River Transmission Corporation; Notice of Compliance Filing

December 13, 2000.

Take notice that on December 6, 2000, Mississippi River Transmission Corporation (MRT) filed with the Commission a compliance filing revising MRT's annual fuel filing pursuant to the FERC Order Granting Rehearing, issued on November 24, 2000 in Docket No. TM00–1–25–004 the following tariff sheets:

Thirty Ninth Revised Sheet No. 5
Thirty Ninth Revised Sheet No. 6
Thirty Sixth Revised Sheet No. 7

MRT states that a copy of this filing is being mailed to each of MRT's customers and to the state commissions of Arkansas, Illinois and Missouri.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32267 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–46–000]

National Fuel Gas Supply Corporation; Notice of Application

December 13, 2000.

Take notice that on December 7, 2000, National Fuel Gas Supply Corporation (National Fuel), 10 Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP01–46–000 an application pursuant to Sections 7(c) and 7(b) of the Natural Gas Act for a certificate of public convenience and necessity to operate, on a permanent basis, certain facilities at its existing Holland Storage Field, Eric County, New York, and permission to abandon by sale 200,000 Mcf of base gas that is no longer required, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be viewed on the web at *http://www.ferc.fed.us./online/rims.htm* (call (202) 208–2222 for assistance).

National Fuel states that Well 7395 and its associated well line, Line CW–7395, located in its Holland Storage Field, Eric County, New York, were completed in 1998 pursuant to 18 CFR 157.215 of the Commission's Regulations and National Fuel's Part 157 blanket certificate. National Fuel further states that the facilities were installed in order to test or develop the potential of the Holland Storage Field to turn more working gas and to restore the deliverability of the field. National Fuel maintains that based on its testing activities over the last three years, Well 7395 has restored 5,000 Mcf per day of deliverability on last day (base gas conditions) at the Holland Storage Field and will allow an additional 200,000 Mcf of active gas to be turned each year. National Fuel now requests permanent authorization to operate Well 7395 and associated Line CW–7395. In addition, National Fuel states that the amount of base gas required in the Holland Storage Field will decrease by 200,000 Mcf upon certification of Well 7395; therefore, National Fuel requests permission to abandon the 200,000 Mcf of base gas no longer needed.

Questions regarding the details of this application should be directed to David W. Reitz, Assistant General Counsel, National Fuel Gas Supply Corporation at (716) 857–7949, 10 Lafayette Square, Buffalo, New York 14203.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before January 3, 2001, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project.

This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. For example, the Commission considers the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Comments and protests may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying a certificate will be issued.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 00–32263 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–627–001

Northern Natural Gas Company; Notice of Compliance Filing

December 13, 2000.

Take notice that on November 27, 2000, Northern Natural Gas Company (Northern) tendered its compliance filing with the Commission's Order on Filings to Establish Imbalance Netting and Trading Pursuant to Order Nos. 587–G and 587–L [93 FERC ¶ 61,903 (2000)] issued on October 27, 2000 (October 27 Order).

Northern states that the purpose of this filing is to comply with the requirements of the October 27 Order.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.214 and Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32274 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–183–000]

OkTex Pipeline Company; Notice of Compliance Filing

December 13, 2000.

Take notice that on December 11, 2000, OkTex Pipeline Company (OkTex), filed tariff sheets to become part of its FERC Gas Tariff Original Volume No. 1 the following pro forma tariff sheets:

Second Revised Sheet No. 1
Second Revised Sheet No. 4
6th Revised Sheet No. 9
2nd Revised Sheet No. 15
4th Revised Sheet No. 17
6th Revised Sheet No. 30
2nd Revised Sheet No. 30A
Fourth Revised Sheet No. 38
7th Revised Sheet No. 39
Original Sheet No. 40G
Original Sheet No. 40H
Original Sheet No. 40I
Original Sheet No. 40J
First Revised Sheet No. 47
First Revised Sheet No. 54
Second Revised Sheet No. 60C
Second Revised Sheet No. 61

OkTex states that on February 9, 2000 the Federal Energy Regulatory Commission (Commission) issued its final rule and Order on rehearing regarding the regulation of short-term interstate natural gas transportation services in Docket Nos. RM98–10–002 and RM98–12–002 (''Order No. 637, and 637–A''). In the instant filing OkTex is filing to implement the requirements of Order Nos. 637 and 637–A relating to capacity release, segmentation, operational flow orders, penalties and imbalance management services.

OkTex states that copies of the filing have been mailed to all affected customers and state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Sections 385.214 or 385.2141 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before January 12, 2001. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32277 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 559–002–CA]

San Diego Gas & Electric Company; Notice of Petition for Declaratory Order, and Soliciting Comments, Motions To Intervene, and Protests

December 13, 2000.

a. *Type of Filing:* Petition for Declaratory Order to Find that the Rincon Transmission Line Project is no longer jurisdictional and no longer requires licensing.

b. *Project No:* 559–002.

c. *Date Filed:* November 16, 2000.

d. *Applicant:* San Diego Gas & Electric Company.

e. *Name of Project:* Rincon Transmission Line Project.

f. *Location:* The Project is located in the City of Escondido, San Diego County, California.

g. *Filed Pursuant to:* Federal Energy Regulatory Commission Regulation, 18 CFR 385.207.

h. *Applicant Contact:* Abby Walsh, San Diego Gas & Electric Co., 101 Ash St., San Diego, CA 92101, (619) 699–5139.

i. *FERC Contact:* William Guey-Lee, (202) 219–2808, or *william.gueylee@ferc.fed.us.*

j. Deadline for filing comments, motions to intervene or protests: January 18, 2001.

All documents (original and eight copies) should be filed with: David Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The existing project consists of a 0.6-mile-long, 12-kV transmission line (designated as Circuit 216) extending from the Rincon Powerhouse of Project No. 176 to San Diego Gas & Electric Company's Pole No. 12,111. San Diego Gas & Electric Co. requests that the Commission find that the Rincon Transmission Line Project is no longer jurisdictional and no longer requires licensing. No federal lands are occupied.

l. *Location of the Filing:* A copy of the filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, D.C. 20426, or by calling (202) 208–1371. This filing may be viewed on *http://www.ferc.fed.us/online/rims.htm* [call (202) 208–2222 for assistance]. A copy is also available for inspection and reproduction at the address in item h above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Secretary.

[FR Doc. 00–32262 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–182–000]

Texas Eastern Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 13, 2000.

Take notice that on December 7, 2000, Texas Eastern Transmission Corporation (Texas Eastern) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, the revised tariff sheets listed on Appendix A to the filing, to become effective on January 7, 2001.

Texas Eastern states that the purpose of this filing is to make the benefits and opportunities of e-commerce available to Texas Eastern's existing and potential customers and to advance the Commission objectives as expressed in Order Nos. 637, *et seq.* of providing equality between the pipeline services and capacity release transactions.

Texas Eastern states that the proposed tariff modifications permit customers to request service agreements electronically and to execute such contracts on line via the LINKr System, which will facilitate nominations and increase the efficiency and convenience of the Texas Eastern contracting process for all customers. Texas Eastern also states that as part of the proposed enhancement to the Texas Eastern contracting process, this filing also modifies certain tariff provisions to expedite the net present value (NPV) contract request and contract execution processes.

Texas Eastern also states that copies of the filing were mailed to all affected customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32276 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–181–000]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

December 13, 2000.

Take notice that on December 8, 2000, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, certain revised tariff sheets, which sheets are enumerated in Appendix A to the filing.

Transco states that the purpose of the instant filing is track rate changes attributable to transportation service purchased from Dominion Transmission, Inc. (Dominion) (formerly CNG Transmission Corporation) under its Rate Schedule GSS the costs of which are included in the rates and charges payable under Transco's Rate Schedules GSS and LSS, and storage service purchased from Texas Eastern Transmission Corporation under its Rate Schedule X–28 the costs of which are included in the rates and charges payable under Transco's Rate Schedule S–2. The filing is being made pursuant to tracking provisions under Section 3 of Transco's Rate Schedule GSS, Section 4 of the Transco's Rate Schedule LSS and Section 26 of the General Terms and Conditions of Transco's Third Revised Volume No. 1 Tariff.

Transco states that included in Appendix B and C attached to the filing are the explanations and details regarding the computation of the Rate Schedule GSS, LSS and S–2 rate changes.

Transco states that copies of the filing are being mailed to each of its GSS, LSS and S–2 customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers.

Secretary.

[FR Doc. 00–32275 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP95–364–012]

Williston Basin Interstate Pipeline Company; Notice of Compliance Filing

December 13, 2000.

Take notice that on December 6, 2000, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1 and Original Volume No. 2, certain revised tariff sheets listed on Appenidx A to the filing.

Williston basin states that the revised tariff sheets were filed in compliance with the Commission's ''Order Accepting Settlement as Modified'' issued November 21, 2000 in the above-reference docket, as more fully described in the filing.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202-208-2222 for assistance).

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32273 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC01–35–000, *et al.*]

Riverside Canal Power Company, *et al.;* Electric Rate and Corporate Regulation Filings

December 11, 2000.

Take notice that the following filings have been made with the Commission:

1. Riverside Canal Power Company

[Docket No. EC01–35–000]

Take notice that on December 1, 2000, Riverside Canal Power Company tendered for filing pursuant to Section 203 of the Federal Power Act an application for authority to lease certain jurisdictional facilities to Southern California Edison Company for the periods of August 15, 2000 to October 30, 2000, and from June 1, 2001 through October 31, 2001.

Comment date: December 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

2. PG&E National Energy Group, Inc., PG&E Enterprises and PG&E Shareholdings, Inc., On Behalf of Themselves and Their Public Utility Subsidiaries

[Docket No. EC01–41–000]

Take notice that on December 4, 2000, PG&E National Energy Group, Inc., PG&E Enterprises and PG&E Shareholdings, Inc. tendered for filing, on behalf of themselves and their public utility subsidiaries, an application under Section 203 of the Federal Power Act seeking authorization for certain changes to the upstream ownership of their public utility subsidiaries following a proposed intra-corporate reorganization.

Comment date: December 22, 2000, in accordance with Standard Paragraph E at the end of this notice.

3. NRG Energy, Inc., NRG Granite Acquisition LLC, LS Power, LLC, Granite Power Partners II, LP

[Docket No. EC01–42–000]

Take notice that on December 6, 2000, NRG Energy, Inc., NRG Granite Acquisition LLC, LS Power, LLC, and Granite Power Partners II, LP filed with

the Federal Energy Regulatory Commission a joint application pursuant to Section 203 of the Federal Power Act requesting authorization for disposition of jurisdictional facilities whereby LS Power, LLC and its partners in Granite Power Partners II, LP will transfer to NRG Energy, Inc. and NRG Granite Acquisition LLC, for cash and subject to certain purchase price adjustments at closing, all of the partnership interests of LS Power, LLC and the other partners in Granite Power Partners II, LP. Granite Power Partners II, LP holds directly or indirectly interests in a portfolio of operating power generating projects and projects in construction and advanced or early-stage development. NRG Energy, Inc. and NRG Granite Acquisition LLC (collectively NRG) intend, as a result of the proposed transaction, to acquire ownership interest in approximately 1,689 MW in three facilities in operation and construction located in Denver City, Texas, Batesville, Mississippi, and Kendall County, Illinois. NRG also intends to acquire in the proposed transaction approximately 2,320 MW with respect to two additional projects expected to be completed and commercially operative as early as the summer of 2002 located in Lee County, Illinois and Pike County, Mississippi. Finally, NRG intends to acquire as a result of the proposed transaction ownership interest in four development projects, which are in early-stage development. These development projects are located in Wachula, Florida, Batesville, Mississippi, and Kendall County, Illinois.

The joint applicants are requesting, pursuant to 18 CFR 388.112, privileged and confidential treatment of the purchase agreement contained in Exhibit H to the joint application as the purchase agreement contains information of a commercially sensitive nature.

Comment date: January 5, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. American Ref-Fuel Company of Essex County, BFI Energy Systems of Essex County, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel LLC, Duke/UAE Essex LLC, Duke/UAE Essex II, Inc., United American Energy Corp., Duke Energy Corporation

[Docket No. EC01–40–000]

Take notice that on December 5, 2000, American Ref-Fuel Company of Essex County, BFI Energy Systems of Essex County, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel LLC, Duke/UAE Essex LLC, Duke/UAE Essex II, Inc., United American Energy Corp. and Duke Energy Corporation tendered for filing a request that the Commission approve a disposition of facilities under Section 203 of the Federal Power Act through change in control over American Ref-Fuel Company of Essex County (ARC-Essex) and a change in the upstream ownership of United American Energy Corp. ARC-Essex leases and operates a biomass-fueled qualifying small power production facility larger than 30 MW.

Comment date: December 26, 2000, in accordance with Standard Paragraph E at the end of this notice.

5. American Ref-Fuel Company of Delaware Valley, L.P., BFI Energy Systems of Delaware County, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel LLC, Duke/UAE Delaware Valley LLC, Duke/UAE Delaware Valley II, Inc., United American Energy Corp., Duke Energy Corporation

[Docket No. EC01–37–000]

Take notice that on December 5, 2000, American Ref-Fuel Company of Delaware Valley, L.P., BFI Energy Systems of Delaware County, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel LLC, Duke/UAE Delaware Valley LLC, Duke/UAE Delaware Valley II, Inc., United American Energy Corp. and Duke Energy Corporation tendered for filing a request that the Commission approve a disposition of facilities under Section 203 of the Federal Power Act in connection with a proposed transfer of partnership interests in American Ref-Fuel Company of Delaware Valley (ARC-Delaware Valley) to subsidiaries of Duke/UAE Ref-Fuel LLC and change in the upstream ownership of United American Energy Corp.

ARC-Delaware Valley leases and operates a biomass-fueled qualifying small power production facility larger than 30 MW.

Comment date: December 26, 2000, in accordance with Standard Paragraph E at the end of this notice.

6. SEMASS Partnership, American Ref-Fuel Company of SEMASS, L.P., BFI Energy Systems of SEMASS, Inc., Browning-Ferris Industries of New York, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel LLC, Duke/UAE Operations of SEMASS, LLC, Duke/UAE SEMASS LLC, Duke/UAE SEMASS II, Inc., United American Energy Corp., Duke Energy Corporation

[Docket No. EC01–39–000]

Take notice that on December 5, 2000, SEMASS Partnership American Ref-Fuel Company of SEMASS, L.P., BFI Energy Systems of SEMASS, Inc., Browning-Ferris Industries of New York, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel, LLC, Duke/UAE Operations of SEMASS, LLC, Duke/UAE SEMASS LLC and Duke/UAE SEMASS II, Inc., United American Energy Corp. and Duke Energy Corporation tendered for filing a request that the Commission approve a disposition of facilities under Section 203 of the Federal Power Act in connection with a proposed transfer of partnership interests in SEMASS Partnership (SEMASS) to subsidiaries of Duke/UAE Ref-Fuel LLC and a change in the upstream ownership of United American Energy Corp. SEMASS leases and operates a biomass-fueled qualifying small power production facility larger than 30 MW in size.

Comment date: December 26, 2000, in accordance with Standard Paragraph E at the end of this notice.

7. New York Independent System Operator, Inc.

[Docket Nos. ER00–3591–000, ER00–1969–001, ER01–94–000, and ER01–180–000]

In the Commission's order issued November 8, 2000, in the above-captioned Docket Nos. ER00–3591–000 and ER00–1969–001, the Commission held that the filing raises certain issues for which a technical conference is to be convened. The orders issued in Docket Nos. ER01–94–000 and ER01–180–000 on November 21, 2000, also described issues to be discussed at this technical conference.

The conference to address the issues has been scheduled for Monday and Tuesday, January 22 and 23, 2001, at an hour and place to be designated in a subsequent notice, which will also set forth the agenda for the conference.

All interested persons and Staff are permitted to attend.

8. Central Maine Power Company

[Docket No. ER01–598–000]

Take notice that on December 6, 2000, Central Maine Power Company (CMP), tendered for filing as an initial rate schedule pursuant to Section 35.12 of the Federal Energy Regulatory Commission's (the Commission) Regulations, 18 CFR 35.12, an executed interconnection agreement (the Agreement) between CMP and Marsh Power L.P. (Marsh Power).

The Agreement is intended to replace and supersede the unexecuted interconnection agreement filed by CMP on March 31, 2000. As such, CMP is requesting that the Agreement become effective March 1, 2000.

Copies of this filing have been served upon the Commission, the Maine Public Utilities Commission, and Marsh Power.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

9. Entergy Services, Inc.

[Docket No. ER01–599–000]

Take notice that on December 6, 2000, Entergy Services, Inc., on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc., (collectively, the Entergy Operating Companies) tendered for filing an unexecuted Network Operating Agreement and an unexecuted Network Integration Transmission Service Agreement between Entergy Services, Inc. and American Electric Power Service Corporation, acting as agent for Southwestern Electric Power Co.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

10. Pennsylvania Electric Company

[Docket No. ER01–600–000]

Take notice that on December 6, 2000, Pennsylvania Electric Company (doing business as GPU Energy), tendered for filing a letter agreement (Agreement) between GPU Energy and Allegheny Energy Supply Company LLC (Allegheny Energy). Under the Agreement, Allegheny Energy has agreed to the operational and financial responsibilities set forth in the GPU Energy Manuals in connection with Allegheny Energy becoming the Load Serving Entity (LSE) for the Pennsylvania Borough of Summerhill.

Copies of the filing were served upon Allegheny Energy, PJM and regulators in the Commonwealth of Pennsylvania.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

11. Xcel Energy Operating Companies Northern States Power Company Northern States Power Company (Wisconsin)

[Docket No. ER01–601–000]

Take notice that on December 6, 2000, Northern States Power Company and Northern States Power Company (Wisconsin) (jointly NSP), wholly-owned utility operating company subsidiaries of Xcel Energy Inc., tendered for filing a Firm Point-to-Point Transmission Service Agreement between NSP and NSP Energy Marketing. NSP proposes the Agreement be included in the Xcel Energy Operating Companies FERC Joint Open Access Transmission Tariff, Original Volume No. 2, as Service Agreement 177–NSP, pursuant to Order No. 614.

NSP requests that the Commission accept the agreement effective November 1, 2000, and requests waiver of the Commission's notice requirements in order for the agreements to be accepted for filing on the date requested.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

12. Southern Company Services, Inc.

[Docket No. ER01–602–000]

Take notice that on December 6, 2000, Southern Company Services, Inc. (SCS), as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company (collectively, Southern Companies), tendered for its annual filing of Revised Accruals for Post-Retirement Benefits Other than Pensions.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

13. American Transmission Systems, Inc.; Pennsylvania Power Company

[Docket No. ER01–604–000]

Take notice that on December 7, 2000, American Transmission Systems, Inc., tendered for filing on behalf of itself and Pennsylvania Power Company, Service Agreements for Network Integration Service and Operating Agreements for the Network Integration Transmission Service under the Pennsylvania Electric Choice Program with The New Power Company and Dominion Retail, Inc. pursuant to the American Transmission Systems, Inc., Open Access Tariff. These agreements will enable the parties to obtain Network Integration Service under the Pennsylvania Electric Choice Program in accordance with the terms of the Tariff.

The proposed effective dates under these agreements is November 30, 2000 and December 6, 2000 respectively.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

14. Pacific Gas and Electric Company

[Docket No. ER01–603–000]

Take notice that on December 7, 2000, Pacific Gas and Electric Company (PG&E) tendered for filing an Interconnection Agreement Between Pacific Gas and Electric Company and the South San Joaquin Irrigation District (SSJID), dated August 23, 2000. The Interconnection Agreement (IA or Agreement) establishes the terms and conditions under which PG&E will provide electric system interconnection between PG&E and SSJID. In its filing letter, PG&E has explained that the IA in this docket is virtually identical to that pending before the Commission in Laguna Irrigation District, Docket No. EL98–46–000 and related Docket No. ER99–3145–000 and that accepted by the Commission in Fresno Irrigation District, Docket No. EL99–50–000, with the exceptions of the name of the Irrigation District, the points of interconnection specified in Appendix A, and a section pertaining to abandoned points of interconnection. PG&E has also explained that the IA contains a reservation of rights with respect to disputes arising under the Federal Power Act.

Copies of this filing have been served upon SSJID and the California Public Utilities Commission.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

15. Allegheny Energy Supply Company, LLC; Monongahela Power Company; The Potomac Edison Company, West Penn Power Company (d/b/a Allegheny Power)

[Docket No. ER01–608–000]

Take notice that on December 5, 2000, Allegheny Energy Supply Company, LLC (Allegheny Energy Supply), tendered for filing revised Sheet Nos. 4, 9, 19, 28, 28A, 34, 35, 39A, 43A, 47A and 51A to its First Revised Rate Schedule FERC No. 3, filed with the Commission on November 13, 2000 at Docket No. ER01–432–000. The filing amends the Agreement to add Monongahela Power Company as a party with the other Allegheny Power companies to reflect the commencement of customer choice in the State of Ohio and updates the Appendices to the Agreement accordingly, and makes some minor and conforming changes.

Allegheny Energy Supply requests an effective date of January 1, 2001.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission and all parties of record.

Comment date: December 26, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC

20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/ online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–32260 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–U

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–56–000]

Transwestern Pipeline Company; Notice of Technical Conference

December 13, 2000.

In the Commission's order issued on November 22, 2000, the Commission directed that a technical conference be held to address issues raised by the filing.

Take notice that the technical conference will be held on Tuesday, January 9, 2001, at 10 a.m., in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

All interested parties and Staff are permitted to attend.

David Boergers,

Secretary.

[FR Doc. 00–32261 Filed 12–18–00; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6918–8]

Draft EPA Guidelines for Management of Onsite/Decentralized Wastewater Systems and Guidance Manual Outline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: The EPA published a document in the **Federal Register** on October 6, 2000, concerning a request for comments on the draft EPA Guidelines for Management of Onsite/ Decentralized Wastewater Systems and Guidance Manual Outline. With this notice, EPA is reopening and extending the comment period from December 5, 2000, to January 19, 2001.

DATES: Comments must be received on or before January 19, 2001.

ADDRESSES: Comments can be submitted online at http://www.epa.gov/owm/smallc/guidelines.htm, emailed to *decentralized@epa.gov,* via U.S. mail to Joyce Hudson, US EPA, Office of Wastewater Management (4204), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or faxed to (202) 564–2397.

FOR FURTHER INFORMATION CONTACT: Joyce Hudson, 202–564–0657

Dated: December 8, 2000.

J. Charles Fox,

Assistant Administrator for Office of Water.

[FR Doc. 00–32241 Filed 12–18–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6918–7; MM–HQ–2001–0005]

Clean Water Act Class II: Proposed Administrative Settlement, Penalty Assessment and Opportunity To Comment Regarding Saputo Cheese USA, Inc.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has entered into a consent agreement with Saputo Cheese USA, Inc. to resolve violations of the Clean Water Act (''CWA''), and its implementing regulations. Saputo Cheese USA, Inc. failed to prepare Spill Prevention Control and Countermeasure (''SPCC'') plans for four facilities where they stored diesel oil in above ground tanks and failed to prepare and implement Storm Water Pollution Prevention Plans (''SWPPP'') as required by its National Pollutant Discharge Elimination System (NPDES) permit for ten facilities. EPA, as authorized by CWA section 311(b)(6), 33 U.S.C. 1321(b)(6), and CWA section 309(g), 33 U.S.C. 1319(g) has assessed a civil penalty for these violations. The Administrator, as required by CWA section 311(b)(6)(C), 33 U.S.C. 1321(b)(6)(C), and CWA section 309(g)(4)(A), 33 U.S.C. 1319(g)(4)(A), is hereby providing public notice of, and an opportunity for interested persons to comment on, this consent agreement and proposed final order.

DATES: Comments are due on or before January 18, 2001.

ADDRESSES: Mail written comments to the Enforcement & Compliance Docket and Information Center (2201A), Docket Number EC–2000–013, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Mail Code 2201A, Washington, DC 20460. (Comments may be submitted on disk in WordPerfect 8.0 or earlier versions.) Written comments may be delivered in person to: Enforcement and Compliance Docket Information Center, U.S. Environmental Protection Agency, Rm. 4033, Ariel Rios Bldg., 1200 Pennsylvania Avenue, NW., Washington, DC. Submit comments electronically to *docket.oeca@epa.gov.* Electronic comments may be filed online at many Federal Depository Libraries.

The consent agreement, the proposed final order, and public comments, if any, may be reviewed at the Enforcement and Compliance Docket Information Center, U.S. Environmental Protection Agency, Rm. 4033, Ariel Rios Bldg., 1200 Pennsylvania Avenue, NW., Washington, DC. Persons interested in reviewing these materials must make arrangements in advance by calling the docket clerk at 202–564–2614. A reasonable fee may be charged by EPA for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Beth Cavalier, Multimedia Enforcement Division (2248–A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 564–3271; fax: (202) 564–9001; e-mail: cavalier.beth@epa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Copies: Electronic copies of this document are available from the EPA Home Page under the link ''Laws and Regulations'' at the **Federal Register**—Environmental Documents entry (http://www.epa.gov/fedrgstr).

I. Background

Saputo Cheese USA, Inc., a cheese manufacturing company incorporated in the State of Delaware and located at 25 Tri-State International Office Center, Suite 250, Lincolnshire, Illinois 60069 failed to prepare SPCC plans for four facilities. Saputo Cheese USA, Inc. disclosed, pursuant to the EPA ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations' (''Audit Policy''), 60 FR 66,706 (December 22, 1995), that it failed to prepare SPCC plans for four

facilities where it stored diesel oil in above ground storage tanks, in violation of the CWA section 311(b)(3) and 40 CFR Part 112, and that it failed to prepare and implement SWPPP plans for ten facilities, in violation of the CWA section 301(a) and 40 CFR Part 122, and CWA section 402(a) and 40 CFR Parts 122.1 and 122.26. EPA determined that Saputo met the criteria set out in the Audit Policy for a 100% waiver of the gravity component of the penalty. As a result, EPA waived the gravity based penalty ($58,825.00) and proposed a settlement penalty amount of nine thousand and eight hundred dollars ($9,800.00). This is the amount of the economic benefit gained by Saputo, attributable to their delayed compliance with the SPCC and NPDES/SWPPP regulations. Saputo Cheese USA, Inc. has agreed to pay this amount in civil penalties. EPA and Saputo negotiated and signed an administrative consent agreement, following the Consolidated Rules of Procedure, 40 CFR section 22.13, on November 21, 2000 (*In Re: Saputo Cheese USA, Inc.,* Docket No. MM–HQ–2001–005). This consent agreement is subject to public notice and comment under CWA section 311(b)(6), 33 U.S.C. section 1321(b)(6) and CWA section 309(g)(4)(A), 33 U.S.C. 1319(g)(4)(A).

Under CWA section 311(b)(6)(A), 33 U.S.C. 1321 (b)(6)(A), any owner, operator, or person in charge of a vessel, onshore facility, or offshore facility from which oil is discharged in violation of the CWA section 311(b)(3), 33 U.S.C. 1321(b)(3), or who fails or refuses to comply with any regulations that have been issued under CWA section 311(j), 33 U.S.C. 1321(j), may be assessed an administrative civil penalty of up to $137,500 by EPA. Class II proceedings under CWA section 311(b)(6) are conducted in accordance with 40 CFR Part 22.

Under CWA section 309(g)(1)(A), 33 U.S.C. 1319 (g)(1)(A), any person found in violation of any permit condition or limitation implementing any of such sections in a permit issued under the CWA section 402(a), 33 U.S.C. 1342, or the CWA section 301(a), 33 U.S.C. 1311(a), may be assessed an administrative civil penalty of up to $125,000 by EPA. Class II proceedings under CWA section 309(g)(1)(A) are conducted in accordance with 40 CFR Part 22.

The procedures by which the public may comment on a proposed Class II penalty order, or participate in a Clean Water Act Class II penalty proceeding, are set forth in 40 CFR 22.45. The deadline for submitting public comment on this proposed final order is January 18, 2001. All comments will be transferred to the Environmental Appeals Board (''EAB'') of EPA for consideration. The powers and duties of the EAB are outlined in 40 CFR 22.04(a).

Pursuant to CWA section 311(b)(6)(C) and CWA section 309(g)(4)(A), EPA will not issue an order in this proceeding prior to the close of the public comment period.

List of Subjects

Environmental protection.

Dated: December 12, 2000.

David A. Nielsen,

Director Multimedia Enforcement Division, Office of Enforcement and Compliance Assurance.

[FR Doc. 00–32242 Filed 12–18–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2457]

Petitions for Reconsideration of Action in Rulemaking Proceedings

December 11, 2000.

Petitions for Reconsideration have been filed in the Commission's rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of this document is available for viewing and copying in Room CY–A257, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857–3800. Oppositions to these petitions must be filed by January 3, 2001. See section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: Compatibility Between Cable and Consumer Electronics Equipment (PP Docket No. 00–67).

Number of Petitions Filed: 2.

Subject: 1998 Biennial Regulatory Review 47 CFR part 90—Private Land Mobile Radio Services (WT Docket No. 98–182, RM–9222).

Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of the Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services (PR Docket No. 92–235).

Number of Petitions Filed: 4.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00–32249 Filed 12–18–00; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting; Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Thursday, December 21, 2000, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors; meetings.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda:

Memorandum re: 2001 FDIC Budget.

Memorandum and resolution re: Final Amendments to Part 362—Activities of Insured State Banks and Insured Savings Associations; Part 337—Unsafe and Unsound Banking Practices; and Part 303—Filing Procedures and Delegations of Authority.

Memorandum and resolution re: Final Amendments—Parts 364 and 308—Standards for Safeguarding Customer Information and Rescission of Year 2000 Standards for Safety and Soundness.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 416–2089 (Voice); (202) 416–2007 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–6757.

Dated: December 14, 2000.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 00–32370 Filed 12–15–00; 11:08 am]

BILLING CODE 6714–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed, new information collection. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments concerning the use of a survey to collect data for the development of a national fire department database.

SUPPLEMENTARY INFORMATION: The U.S. Fire Administration (USFA) receives many requests from fire service organizations and the general public for information related to fire departments, including total number of departments, number of stations per department, population protected, and number of firefighters. The USFA also has a need for this information to guide programmatic decisions, produce mailing lists for USFA publications, and serve as a baseline from which to eventually sample fire loss data. Recommendations for the creation of the fire department database came out of a Blue Ribbon Panel's review of the USFA—initiated by FEMA Director James Lee Witt in the spring of 1998. The report included a review of the structure, mission and funding of the USFA, future policies, programmatic needs, course development and delivery, and the role of the USFA to reflect changes in the fire service. The panel included 13 members of the U.S. fire community. As a result of those recommendations, the USFA is working to identify all fire departments in the United States to develop and populate a national database that will include information related to demographics, capabilities and activities of fire departments Nationwide.

Collection of Information

Title. National Fire Department Census.

Type of Information Collection. New.

Abstract. Many data products and reports exist that contain fragmented or estimated information about fire department demographics, and capabilities, but there is no single reference source today that aggregates this data to provide a complete and accurate profile of fire departments in the United States. The U.S. Fire Administration (USFA) receives many requests for information related to fire departments, including total number of departments, number of stations per department, population protected, apparatus and equipment status. The USFA is working to identify all fire departments in the United States to develop and populate a national database that will include information related to demographics, capabilities and activities. The database will be used by USFA to guide programmatic decisions, provide the Fire Service and the public with information about fire departments, to produce mailing lists for USFA publications and other materials, and serve as a baseline from which to sample fire loss data.

Affected Public: Federal, State, local government, volunteer, and industrial fire departments.

Estimated Total Annual Burden Hours.

	Number of respondents (A)	Frequency of response (B)	Hours per response (C)	Annual burden hours (A × B × C)
FEMA forms	33,000	1	25 Minutes (.42)	13,860
Total	33,000	1	25 Minutes (.42)	13,860

Estimated Cost. The estimated costs to the government will be contracted direct labor and associated overhead costs of $433,500. There would be no costs to the respondent other than the minimal direct labor cost of a single firefighter or emergency service worker taking a small amount of time to complete the survey and this would be applicable only to those fire departments and emergency service agencies with career employees. The majority of the respondents will be from volunteer fire departments for which no direct labor costs will be incurred. The estimate of respondent costs for those career departments is computed as follows: Estimated number of surveys multiplied by the national average hourly rate of a firefighter of $18.65 multiplied by .42 (representing the estimated 25 minutes it takes to complete the survey) and multiply that by .25 which represents the percentage of respondents who are career (paid) personnel. Using this equation, total estimated costs to respondents of $64,622 is derived (33,000 estimated surveys × $18.65 = $615,450 × .42 = $258,489 × .25 = $64,622). The average cost per survey is a minimal $1.96. The respondents are under no obligation to complete the survey and may refuse to do so or stop at any time so the average cost to the respondent of $1.96 could easily not be incurred by refusing to fill out the survey.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. Comments should be received within 60 days of the date of this notice.

ADDRESSES: Interested persons should submit written comments to Muriel B. Anderson, Chief, Records Management Branch, Program Services Division, Operations Support Directorate, Federal Emergency Management Agency, 500 C Street, SW, Room 316, Washington, DC 20472. Telephone number (202) 646–2625. FAX number (202) 646–3524 or e:mail muriel.anderson@fema.gov.

FOR FURTHER INFORMATION CONTACT: Bradley S. Pabody, Fire Program Specialist, United States Fire Administration, National Fire Data Center, (301) 447–1340 for additional information. Contact Ms. Anderson at (202) 646–2625 for copies of the proposed collection of information

Dated: December 12, 2000.

Reginald Trujillo,

Director, Program Services Division, Operations Support Directorate.

[FR Doc. 00–32215 Filed 12–18–00; 8:45 am]

BILLING CODE 6718–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1193–DR]

Government of Guam; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for Government of Guam (FEMA–1193–DR), dated December 17, 1997, and related determinations.

EFFECTIVE DATE: December 6, 2000.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3630.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the cost share arrangement concerning Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106–390, 114 Stat. 1552 (2000) and the Insular Areas Act (48 U.S.C. 1469a (d) for the Public Assistance program is adjusted at 100 percent Federal funding. This adjustment applies to eligible costs associated with Categories A and B (debris removal and emergency protective measures) under the Public Assistance program. All other cost sharing adjustments under FEMA–1193–DR remain the same.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

James L. Witt,

Director.

[FR Doc. 00–32214 Filed 12–18–00; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 19817 (j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors/ Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 2, 2001.

A. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. James A. Waters, Wynnewood, Oklahoma, and Janet G. Streich, Englewood, Colorado; to acquire voting shares of Garvin County Bancshares, Inc., Wynnewood, Oklahoma, and thereby indirectly acquire voting shares of State Bank of Wynnewood, Wynnewood, Oklahoma.

Board of Governors of the Federal Reserve System, December 13, 2000.

Robert deV. Frierson

Associate Secretary of the Board.

[FR Doc. 00–32211 Filed 12–18–00; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10 a.m., Thursday, December 21, 2000.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda: Because of their routine nature, no discussion of the following items is anticipated. These matters will be voted on without discussion unless a member of the Board requests that an item be moved to the discussion agenda.

1. Consideration of final rules under Regulation Y (Bank Holding Companies and Change in Bank Control) that implement the Gramm-Leach-Bliley Act by (a) providing procedures for eligible domestic organizations to elect to become financial holding companies (Docket No. R–1057); and (b) describing activities that are permissible for financial holding companies and providing procedures for conducting these activities (Docket No. R–1062). These rules revise and replace interim rules that were published for comment earlier this year.

2. Consideration of a proposal for comment to amend Regulation Y (Bank Holding Companies and Change in Bank Control), pursuant to section 4(k)(5) of the Bank Holding Company Act as amended by the Gramm-Leach-Bliley Act, to designate three categories of activities as permissible for financial holding companies and to provide procedures for determining that particular activities are included within the proposed categories.

3. Publication for comment of proposed modifications to the methodology for calculating the Private Sector Adjustment Factor.

4. *Discussion Agenda*: Proposed new Regulation G (Disclosure and Reporting of CRA-Related Agreements) to implement the Community Reinvestment Act sunshine requirements of the Gramm-Leach-Bliley Act (proposed earlier for public comment; Docket No. R–1069).

5. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will then be available for listening in the Board's Freedom of Information Office, and copies can be ordered for $6 per cassette by calling 202–452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System Washington, D.C. 20551.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 for a recorded announcement of this meeting; or you may contact the Board's Web site at http://www.federalreserve.gov for an electronic announcement. (The Web site also includes procedural and other information about the open meeting.)

Dated: December 14, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–32369 Filed 12–15–00; 11:26 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System

TIME AND DATE: Approximately 10:45 a.m., Thursday, December 21, 2000, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any matters carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.federalreserve.gov for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: December 14, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–32369 Filed 12–15–00; 11:14 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 65 FR 77880, December 13, 2000.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 12 noon, Monday, December 18, 2000.

CHANGES IN THE MEETING:

One of the items announced for inclusion at this meeting was consideration of any agenda items carried forward from a previous meeting; the following such closed item(s) was added: Future capital framework. (This item was originally announced for a closed meeting on November 20, 2000.)

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 for a recorded announcement of this meeting; or you may contact the Board's Web site at http://www.federalreserve.gov for an electronic announcement. (The Web site also includes procedural and other information about the open meeting.)

Dated: December 15, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–32431 Filed 12–15–00; 3:29 pm]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office for Civil Rights; Section 504 of the Rehabilitation Act of 1973; Notice of Exercise of Authority Under 45 CFR 84.52(d)(2) Regarding Recipients With Fewer Than Fifteen Employees

AGENCY: Office for Civil Rights, HHS.

ACTION: Notice of exercise of authority under 45 CFR 84.52(d)(2) regarding recipients with fewer than fifteen employees pursuant to section 504 of the Rehabilitation Act of 1973.

SUMMARY: Pursuant to 45 CFR 84.52(d)(2), the Director of the Office for Civil Rights may require recipients with fewer than 15 employees to provide auxiliary aids where the provision of such aids would not significantly impair the ability of the recipient to provide its benefits or services. The United States Department of Health and Human Services (HHS) is announcing that it is exercising its authority under 45 CFR 84.52(d)(2) of the regulation implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), to require recipients with fewer than fifteen employees to provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from their services. This is not a new requirement; Title III of the Americans with Disabilities Act (ADA) already requires public accommodations of all sizes to provide auxiliary aids and services to persons with disabilities where necessary to ensure effective communication and Title II of the ADA extends the same requirement to state and local government entities. The vast majority of entities that receive federal financial assistance from HHS thus are already required to provide auxiliary aids and services to persons with disabilities where necessary to ensure effective communication.

DATES: This guidance is effective immediately.

FOR FURTHER INFORMATION CONTACT: Sheila Foran or Ronald Copeland at the Office for Civil Rights, Room 506F, U.S. Department of Health and Human Services, 200 Independence Avenue, SW., Washington, D.C. 20201, telephone 202–619–0403; TDD 1–800–537–7697. Arrangements to receive the notice in an alternative format may be made by contacting the named individuals.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to inform recipients of federal financial assistance from HHS that the Office for Civil Rights (OCR) will require recipients with fewer than 15 employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services, and will investigate complaints against health and social services providers with fewer than 15 employees for failure to provide auxiliary aids to individuals with disabilities under Section 504. Determinations of whether the provision of an auxiliary aid or service would impose an undue burden on a small provider will be made on a case-by-case basis. The fact that the provision of any particular auxiliary aid would result in an undue burden does not relieve the provider from the duty to furnish an alternative auxiliary aid, if available, that would not result in such a burden.

OCR has concluded that, in the interest of uniformity and consistent administration of law, Section 504's auxiliary aids requirement should be applied to covered entities with fewer than 15 employees, as is the case under the Americans with Disabilities Act of 1990. Title III of the ADA specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. 42 U.S.C. 12182. The term ''public accommodation'' includes professional offices of health care providers, hospitals, pharmacies, and other service establishments. Under Title III of the ADA, privately operated public accommodations are obligated to provide appropriate auxiliary aids and services, regardless of their size, where necessary to ensure effective communication with individuals with

disabilities, unless they can demonstrate that taking such steps would fundamentally alter the nature of their program, services or activities, or would result in an undue burden. *See* 42 U.S.C. 12182(b)(2)(A)(iii). The ADA requires public accommodations, including health and social service providers, to furnish appropriate auxiliary aids to ensure effective communication with individuals with disabilities without the imposition of a surcharge to cover the cost of such measures.

OCR believes that exercising its authority under 45 CFR 84.52(d)(2) is consistent with Congress' intent to ensure consistency between Section 504 and the ADA. 42 U.S.C. 2117(b) of the Americans with Disabilities Act addresses coordination between agencies with enforcement authority under the ADA and Section 504 of the Rehabilitation Act of 1973. Consistent with that provision, agencies must ensure that administrative complaints filed under both the ADA and Section 504 are dealt with in a manner that prevents the imposition of inconsistent or conflicting standards for the same requirements. *See, e.g.,* 42 U.S.C. ss. 12117(b), 12134(b) and 12201(a). Other evidence of Congress' desire for consistent enforcement standards can be found in several amendments to Title V of the Rehabilitation Act of 1973. For example, Section 102(f) of the Rehabilitation Act Amendments of 1992, Pub. L. 102–569, incorporated the exclusions from the term ''individual with disability'' that are set forth in the ADA. Also, Section 504 of the Rehabilitation Act Amendments of 1992 amended the Rehabilitation Act of 1973 by adding a new subsection to clarify that the standards used for determining whether Section 504 has been violated in a complaint alleging employment discrimination are the same standards applied under the ADA.

As noted above, Title III of the ADA does not require a public accommodation to provide auxiliary aids and services if it can demonstrate that taking such steps would fundamentally alter the nature of the services being offered or result in an undue burden. The undue burden defense established under the ADA evidences that Congress favored a case-by-case approach for determining a public accommodation's obligation to provide auxiliary aids rather than a broad exemption for small providers. OCR believes that requiring recipients with fewer than 15 employees to provide auxiliary aids under the Section 504 regulation at 45 CFR 84.52(d)(2), where the provision of such aids would not significantly impair the ability of the recipient to provide its benefits or services, is consistent with the legislative scheme intended by Congress under the ADA.

Most of the entities that receive federal financial assistance from HHS are also subject to the effective communication requirements established under the ADA. OCR is confident that the enforcement of Section 504's auxiliary aids requirement can be applied in a manner that will not unduly burden small providers.

OCR will enforce Section 504 as it applies to recipients' responsibilities under the notice through procedures provided for in the Section 504 regulations. These procedures include complaint investigations, compliance reviews, efforts to secure voluntary compliance and technical assistance. OCR will always provide recipients with a complete opportunity to come into voluntary compliance with Section 504 prior to initiating formal enforcement proceedings, and will provide technical assistance to help entities resolve complaints in a collaborative fashion with OCR.

Dated: December 6, 2000.

Thomas E. Perez,

Director, Office for Civil Rights.

[FR Doc. 00–32194 Filed 12–18–00; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Bioethics Advisory Committee Request; International Research Ethical and Policy Issues; Comment Request

ACTION: Notice for comment on the draft report of the National Bioethics Advisory Commission (NBAC), *Ethical and Policy Issues in the Oversight of Human Research.*

SUMMARY: Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is given for comment on a draft report written by the National Bioethics Advisory Commission (NBAC). The Commission will consider all comments it receives as part of its ongoing deliberations in finalizing this report.

Purpose of the Report

In October 1995, President Clinton established NBAC to advise on bioethics and public policy issues related to conducting human research. NBAC makes recommendations to the White House and other departments and agencies. This report, therefore, falls within NBAC's mandate.

Prior to NBAC's creation, in 1994, the Advisory Committee on Human Radiation Experiments (ACHRE) was created to investigate reports of federally sponsored human research involving radioactive materials and to assess the current state of protections for research participants. With regard to the latter charge they found, ''evidence of serious deficiencies in some parts of the current system.'' Specifically, ACHRE was concerned with variability in the quality of IRBs, persistent confusion among human participants as to whether they were involved in research or therapy, and insufficient attention to the implications of diminished decision-making capacity in the consent process. ACHRE also recommended the creation of a national advisory group to examine these issues. When NBAC was established, one of its first priorities was to examine the system for protecting human research participants.

In May of 1997, NBAC unanimously resolved that ''No person in the United States should be enrolled in research without the twin protections of informed consent by an authorized person and independent review of the risks and benefits of the research.'' The following year, NBAC wrote to the President indicating areas of concern and preliminary findings regarding the oversight of human research in the United States. The key concerns identified were:

- Federal protections for persons serving as subjects in research do not yet extend to all Americans.
- Despite widespread implementation of federal regulations by those departments and agencies sponsoring substantial amounts of biomedical research, a number of departments and agencies who sponsor primarily non-biomedical research or little research overall have failed to implement fully these federal protections.
- Federal protections do not always include specific provisions for especially vulnerable populations of research subjects.
- Many federal agencies find the interpretation and implementation of the Common Rule confusing and/or unnecessarily burdensome.
- Federal protections are difficult to enforce and improve effectively throughout the Federal Government, in part because no single authority or office oversees research protections across all government agencies and departments.
- New techniques are needed to ensure implementation at the local level.

In October 1999, Dr. Neal Lane, Assistant to the President for Science and Technology, reinforced the request that NBAC examine the federal system of oversight. This report addresses the basic purpose, structure, and implementation of research oversight. We recommend broad, strategic changes to the oversight system. This report is not intended to be a rewrite of federal regulations but instead to provide the guidance, direction, and justification for change. Providing Comments to the Draft Report.

You may provide written comments electronically or through mail or fax. Electronic submissions (by email or by website) are preferred as they will be processed more efficiently. The following are addresses for submitting comments: e-mail: nbac@od.nih.gov, NBAC website: www.bioethics.gov, mail: 6705 Rockledge Drive, Suite 700, Bethesda, Maryland 20892–7979, fax: (301) 480–6900.

If your comments are not postmarked by February 17, 2001, we can not guarantee they will be given full consideration.

TO RECEIVE A COPY OF THIS DRAFT REPORT CONTACT: National Bioethics Advisory Commission, 6705 Rockledge Drive, Suite 700, Bethesda, Maryland 20892–7979, telephone (301) 402–4242, fax number (301) 480–6900, or visit the website at www.bioethics.gov.

SUPPLEMENTARY INFORMATION: The President established the National Bioethics Advisory Commission (NBAC) on October 3, 1995 by Executive Order 12975 as amended. The mission of the NBAC is to advise and make recommendations to the National Science and Technology Council, its Chair, the President, and other entities on bioethical issues arising from the research on human biology and behavior, and from the applications of that research.

Dated: December 13, 2000.

Eric M. Meslin,

Executive Director, National Bioethics Advisory Commission.

[FR Doc. 00–32200 Filed 12–18–00; 8:45 am]

BILLING CODE 4167–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control And Prevention

[60Day–01–08]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506 (c)(2)(A) of the Paperwork reduction Act of 1995, the Center for Disease Control and Prevention is providing opportunity for public comment on proposed data collection projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 639–7090.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques for other forms of information technology. Send comments to Anne O'Connor, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Project

Linking Epidemiologic Research to Disease Prevention: A Pilot Program to Test Approaches for Communicating Increased Risk of Cervical Cancer to Female Workers in the Dry-Cleaning Industry —NEW—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

The National Institute for Occupational Safety and Health (NIOSH) has conducted worker notification formally since 1988. This program informs workers in NIOSH-conducted epidemiological studies about the study results and hence, of their risks. The intervention research to be conducted under this application will extend the risk communication beyond the mortality study cohort (an aging and mostly retired cohort) to similarly exposed women, younger and still employed.

Several studies, including one conducted at NIOSH, have documented elevated mortality from cancer among dry cleaning workers. Some of the cancers involved—most notably cervical cancer—can be successfully treated if detected early. Thus, along with better hazard control, better secondary disease prevention is urgently needed to help women workers already exposed. Exiting NIOSH procedures for notifying workers about the agency's research findings seem unlikely to reach the larger at-risk population of women dry cleaners who were not actually study subjects.

The ultimate purpose of this research is to increase understanding of how to encourage medical screening among workers at risk. The project has two main objectives: (1) To assess descriptively the feasibility and potential public health benefits of a broader than usual approach to NIOSH worker notification about occupational health risks, based on results of NIOSH epidemiologic research; and (2) to determine whether a follow-up reminder about the importance of medical screening makes a significant difference in the notified workers' long-term health behavior.

The primary study population will consist of a minimum 300 current female dry cleaning workers in New York City (ages 18–65), selected from the membership list (a respondent universe of 375) from the dry cleaners' local labor union. A separate population of 100 former dry cleaning workers randomly selected from a cohort list of approximately 226 surviving women dry cleaners in a NIOSH cohort mortality study will provide descriptive data only and will not be included in the data analysis of the primary group of currently employed dry cleaners. All study participants will be mailed a packet of risk information from NIOSH, along with a letter of endorsement of the study from the local union in New York, encouraging participation in the study. The risk information packet will include the NIOSH mortality study results as well as other information about cancer and cancer screening, with a special emphasis on cervical cancer screening.

Brief (15-minute) telephone interviews will follow the mailed notifications to workers and will be used to evaluate (1) the effects of an intervention (mailed written notification materials) on post-intervention cervical cancer screening behaviors; and (2) the effects of a reminder message mailed six months after the initial notification.

The effect of the first intervention will be measured by comparing the pre- and post-intervention screening behaviors

for the year prior to the intervention. The effect of the second intervention will be evaluated experimentally (using a control group), measuring the screening behaviors from the time of the reminder letter to the Time-2 interview 6 months later, compared to the screening behaviors at the Time-1 interview.

These intervention evaluations will address barriers to cervical screening and also will allow insight into the following questions:

1. Does the outreach message have a long-term impact concerning the use of cancer screening services (message retention and actual screening behavior)?

2. Does receiving a screening reminder affect message retention and actual screening behavior?

The total cost to all respondents (current dry cleaners and surviving dry cleaners from the NIOSH mortality study) in the two-year study is estimated at $2733.46 based on an average wage of $10.79 per hour.

Respondents	No. of respondents	No. of responses	Avg. burden Per response (in hrs.)	Total burden (in hrs.)
Year 1	400	1	20/60	133.3
Year 2	360	1	20/60	120.0
Total	.....	.....	.....	253.3

Dated: December 8, 2000.

Nancy Cheal,

Acting Associate Director for Policy, Planning and Evaluation Centers for Disease Control and Prevention, (CDC).

[FR Doc. 00–32204 Filed 12–18–00; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00D–1584]

Draft Guidance for Industry on Labeling OTC Human Drug Products—Submitting Requests for Exemptions and Deferrals; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Labeling OTC Human Drug Products—Submitting Requests for Exemptions and Deferrals.'' The draft guidance is intended to provide information on procedures for requesting an exemption or deferral in accordance with the final rule that established standardized format and content requirements for the labeling of over-the-counter (OTC) human drug products.

DATES: Submit written comments on the draft guidance by February 20, 2001. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Copies of this draft guidance for industry are available on the Internet at http://www.fda.gov/cder/guidance/index.htm. Submit written requests for single copies of the draft guidance to the Drug Information Branch (HFD–210), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Gerald M. Rachanow, Center for Drug Evaluation and Research (HFD–560), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–2222.

SUPPLEMENTARY INFORMATION: FDA is announcing the availability of a draft guidance for industry entitled ''Labeling OTC Human Drug Products—Submitting Requests for Exemptions and Deferrals.'' This is one of a series of guidances intended to help manufacturers, packers, and distributors implement the final rule establishing standardized format and content requirements for the labeling of all OTC drug products. Once finalized, these guidances will supersede all other statements, feedback, and correspondence provided by the agency on these matters since the issuance of the final rule.

In the **Federal Register** of March 17, 1999 (64 FR 13254), FDA published a final rule establishing standardized format and content requirements for the labeling of all OTC drug products, including drug-cosmetic products. This rule is intended to standardize labeling for all OTC human drug products to help consumers read and understand the product labeling and use these products safely and effectively.

This draft document is intended to provide guidance on the format and procedures for submitting requests for exemptions and deferrals from the requirements of the rule.

This draft guidance is being issued consistent with FDA's good guidance regulation (21 CFR 10.115; 65 FR 56468, September 19, 2000). The draft guidance represents the agency's current thinking on exemptions and deferral procedures related to the labeling of OTC human drug products (21 CFR part 201). It does not create or confer any rights for or on any person and does not operate to bind FDA or the public.

Interested persons may submit to the Dockets Management Branch (address above) written comments on the draft guidance. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 4, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–32195 Filed 12–18–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 99D–5013]

Guidance for Industry on Labeling Over-the-Counter Human Drug Products Using a Column Format; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Labeling OTC Human Drug Products Using a Column Format.'' This guidance is intended to provide information on the use of columns as part of the standardized content and format requirements for the labeling of over-the-counter (OTC) drug and drug-cosmetic products.

DATES: The guidance for industry is effective December 19, 2000. Submit written comments on agency guidances at any time.

ADDRESSES: Copies of this guidance for industry are available on the Internet at http://www.fda.gov/cder/guidance/index.htm. Submit written requests for single copies of this guidance to the Drug Information Branch (HFD–210), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Gerald M. Rachanow or Cazemiro R. Martin, Center for Drug Evaluation and Research (HFD–560), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–2222.

SUPPLEMENTARY INFORMATION: FDA is announcing the availability of a guidance for industry entitled ''Labeling OTC Human Drug Products Using a Column Format.'' This is one of several guidances the agency is developing to help manufacturers, packers, and distributors implement the recently issued final rule establishing standardized content and format requirements for the labeling of all OTC drug products. Once finalized, these guidances will supersede all other statements, feedback, and correspondence provided by the agency on these matters since the issuance of the final rule.

In the **Federal Register** of March 17, 1999 (64 FR 13254), FDA published a final rule establishing standardized content and format requirements for the labeling of all OTC drug products, including drug-cosmetic products (products that consist of both drug and cosmetic components or a single component marketed for both drug and cosmetic uses). This rule is intended to standardize labeling for all OTC drug products so consumers can easily read and understand OTC drug product labeling and use these products safely and effectively.

The regulation for this new standardized labeling requires manufacturers to present OTC drug and drug-cosmetic labeling information in a prescribed order and format.

The agency received a number of inquiries about the use of columns in OTC drug product labeling under the new regulation. To address those inquiries, in the **Federal Register** of December 1, 1999 (64 FR 67291), FDA published a notice announcing the availability of a draft guidance entitled ''Labeling Over-the-Counter Human Drug Products Using a Column Format,'' which would make recommendations about how to use columns in OTC drug product labeling in a way that is consistent with the regulation. The notice invited interested persons to submit comments on the draft guidance by January 31, 2000. In response, the agency received four comments from national trade associations representing manufacturers and distributors of OTC drug and drug-cosmetic products and from manufacturers of OTC drug products.

In addition to allowing two or more Drug Facts boxes on the same side of a package (as stated in the draft guidance), the comments requested that FDA: (1) Allow the use of columns within a single Drug Facts box or, at a minimum, within headings (e.g., the ''Warnings'' section of the labeling); (2) eliminate the ''Drug Facts (continued)'' requirement from the top of the second (and additional, if present) Drug Facts boxes on the same side of a package and eliminate the use of an arrow leading to the next panel; (3) if columns are allowed within a single Drug Facts box, eliminate the requirement that subsequent columns begin with a heading or subheading; (4) replace ''Drug Facts (continued)'' at the top of a second (or subsequent) column with the previous heading or subheading that appears in the labeling and add ''(continued)'' when information continues from one column to another; (5) eliminate the recommendation in the draft guidance that multiple columns should be approximately the same size; and (6) provide an alternate way to present active ingredient and purpose information on narrow panels e.g., active ingredient information on one line and the purpose directly below it).

As a general matter, the requests go beyond what the final rule provides for in labeling OTC drug products. In particular, the proposed use of ''columns within columns'' would represent a significant departure from the overall look and format of the final rule. The agency also believes it is important to maintain the current requirements regarding the use of ''signals'' to show the continuation of the required labeling from one column or panel to the next. The use of such signals is important for the continuous flow of information on the ''Drug Facts'' label. These signals provide a valuable visual cue for introducing the next column of information, without unnecessarily distracting or confusing the reader.

The agency also will continue to recommend that multiple columns on the same side of a package be uniform in size to make it easier for consumers to follow and read the labeling information. The agency believes that the use of different size columns could be distracting and cause consumers to miss important labeling information. Finally, although the final rule requires that the active ingredient and purpose be stated on the same line, this final guidance clarifies that the final rule permits the dosage unit information to be stated directly underneath the active ingredient.

This guidance is being issued consistent with FDA's good guidance practices (65 FR 56468, September 19, 2000). The guidance represents the agency's current thinking on using a column format in the labeling of OTC human drug products (21 CFR part 201). It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such an approach satisfies the requirements of the applicable statutes and regulations.

Interested persons may, at any time, submit to the Dockets Management Branch (address above) written comments on the guidance. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 4, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–32196 Filed 12–18–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00D–1630]

International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH); Draft Guidance on ''Safety Studies for Veterinary Drug Residues in Human Food: Reproduction Studies'' (VICH GL22); Availability; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability for comment of a draft guidance for industry (#115) entitled ''Safety Studies for Veterinary Drug Residues in Human Food: Reproduction Studies'' (VICH GL22). This draft guidance has been adapted for veterinary use by the International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH) from a guidance regarding pharmaceuticals for human use, which was adopted by the International Conference on Harmonisation of Technical Requirements for Approval of Pharmaceuticals for Human Use (ICH). This draft VICH guidance document recommends a basic battery of tests that can be used to evaluate the reproduction safety of veterinary drug residues in human food.

DATES: Submit written comments concerning the draft guidance to ensure their adequate consideration in preparation of the final document by February 20, 2001. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written comments on the draft guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the full title of the draft guidance and the docket number found in brackets in the heading of this document.

Copies of the draft guidance entitled ''Safety Studies for Veterinary Drug Residues in Human Food: Reproduction Studies'' (VICH GL22) may be obtained on the Internet from the CVM home page at http://www.fda.gov/cvm/fda/TOCs/guideline.html. Persons without Internet access may submit written requests for single copies of the draft guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

FOR FURTHER INFORMATION CONTACT: *Regarding VICH:* Sharon R. Thompson, Center for Veterinary Medicine (HFV–3), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1798, e-mail: sthompso@cvm.fda.gov, or Carole R. Andres, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6524, e-mail: candres1@cvm.fda.gov.

Regarding the guidance document: Louis T. Mulligan, Center for Veterinary Medicine (HFV–153), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6984, e-mail: lmulliga@cvm.fda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote the international harmonization of regulatory requirements. FDA has participated in efforts to enhance harmonization and has expressed its commitment to seek scientifically based harmonized technical procedures for the development of pharmaceutical products. One of the goals of harmonization is to identify and then reduce the differences in technical requirements for drug development among regulatory agencies.

FDA has actively participated in the ICH for several years to develop harmonized technical requirements for the approval of human pharmaceutical and biological products among the European Union, Japan, and the United States. The VICH is a parallel initiative for veterinary medicinal products. The VICH is concerned with developing harmonized technical requirements for the approval of veterinary medicinal products in the European Union, Japan, and the United States, and includes input from both regulatory and industry representatives.

The VICH Steering Committee is composed of member representatives from the: European Commission; European Medicines Evaluation Agency; European Federation of Animal Health; U.S. FDA; U.S. Department of Agriculture; Animal Health Institute; Japanese Veterinary Pharmaceutical Association; Japanese Association of Veterinary Biologics; and Japanese Ministry of Agriculture, Forestry, and Fisheries.

Two observers are eligible to participate in the VICH Steering Committee: One representative from the Government of Australia/New Zealand, and one representative from the industry in Australia/New Zealand. The VICH Secretariat, which coordinates the preparation of documentation, is provided by the Confederation Mondiale de L'Industrie de la Sante Animale (COMISA). A COMISA representative also participates in the VICH Steering Committee meetings.

II. Guidance on Reproduction Studies

The VICH Steering Committee held a meeting on June 14 through 16, 2000, and agreed that the draft guidance entitled ''Safety Studies for Veterinary Drug Residues in Human Food: Reproduction Studies'' (VICH GL22) should be made available for public comment.

This draft guidance is intended to provide harmonized guidance on the core recommendation for a multigeneration study for the safety evaluation of veterinary drug residues in human food. The current draft guidance is one of a series of guidances developed to facilitate the mutual acceptance of safety data necessary for the determination of acceptable daily intakes for veterinary drug residues in human food by the relevant regulatory authorities. The guidance on the overall strategy for the safety evaluation of veterinary residues in human food (VICH Guidance on General Testing Approach) will be made available at a later time. VICH GL22 was developed after consideration of the existing ICH guidance for pharmaceuticals for human use on ''Detection of Toxicity to Reproduction for Medicinal Products'' and its addendum, ''Toxicity to Male Fertility,'' in conjunction with the current practices for evaluating veterinary drug residues in human food in the European Union, Japan, the United States, Australia, and New Zealand. (Information collection is covered under OMB Control Nos. 0910–0117 and 0910–0032).

III. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices (65 FR 56468, September 19, 2000). For example, the documents have been designated ''guidance'' rather than ''guideline.'' Because guidance documents are not binding, unless specifically supported by statute or regulation, mandatory words such as ''must,'' ''shall,'' and ''will'' in the

original VICH documents have been substituted with ''should.'' Similarly, words such as ''requirement'' or ''acceptable'' have been replaced by ''recommendation'' or ''recommended'' as appropriate to the context.

This draft guidance represents the agency's current thinking on reproduction safety studies for veterinary drug residues in human food. This draft guidance does not create or confer any rights for or on any person and will not operate to bind FDA or the public. An alternative method may be used as long as it satisfies the requirements of applicable statutes and regulations. Comments about the draft guidance documents will be considered by FDA and the VICH Safety Working Group. Ultimately, FDA intends to adopt the VICH Steering Committee's final guidances and publish them as future guidances.

IV. Comments

This draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Dockets Management Branch (address above) written comments regarding this draft guidance. Submit written comments to ensure adequate consideration in preparation of the final guidance by February 20, 2001. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. A copy of the draft guidance and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 7, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–32197 Filed 12–18–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health/National Institute of Environmental Health Sciences

Submission for OMB Review; Comment Request; Environmental Factors in the Development of Polycystic Ovary Syndrome

SUMMARY: Under the provisions of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute of Environmental Health Sciences (NIEHS), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on September 1, 2000, page 53326 and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection

Title: Environmental Factors in the Development of Polycystic Ovary Syndrome. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* We will administer a brief telephone survey to 2032 twin women from the Mid-Atlantic Twin Registry (MATR) who previously reported having irregular periods and/or cystic ovaries on a MATR General Health History Survey. Question in the proposed survey focus on the two hallmark features of Polycystic Ovary Syndrome (PCOS), hyperandrogenism and anovulation, other relevant physical characteristics, and if the woman has a living female twin sister. Women will also be asked for permission to recontact them for potential participation in future PCOS studies. The data will be used in statistical modeling analyses to identify those women with a high probability of having PCOS and estimate the number of potential candidates for future PCOS studies. *Frequency of Response:* One time. *Affected Public:* Individuals; *Type of Respondents:* Adult women. The annual reporting burden is as follows: *Estimated Number of Respondents:* 2,100; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* 0.167; and *Estimated Total Annual Burden Hours Requested:* 350.7. The annualized cost to respondents is estimated at: $3,507.00. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB

Written comment and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC. 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. Patricia C. Chulada, Clinical Research Scientist, Clinical Research Office, NIEHS, P.O. Box 12233, Research Triangle Park, NC 27709 or call non-toll-free number (919) 541–7736 or E-mail your request, including your address to: *chulada@niehs.nih.gov.*

DATES: *Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received on or before January 18, 2001.

Dated: December 7, 2000.

Francine Little,

Associate Director for Management, NIEHS.

[FR Doc. 00–32221 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; The Family Health Study (Validation of a Family History of Cancer Questionnaire for Risk Factor Surveillance)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Cancer Institute (NCI), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal**

Register on June 7, 2000, page 36149–36159 and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection

Title: The Family Health Study (Validation of a Family History of Cancer Questionnaire for Risk Factor Surveillance).

Type of Information Collection Request: NEW.

Need and Use of Information Collection: In this methodologic pilot study, the NCI will develop a family history of cancer questionnaire for use in cancer risk factor surveillance, and will evaluate how accurately individuals in the general population can report major cancers occurring in their immediate and extended family. This study is needed because there are currently no validated questionnaires with which to collect comprehensive data for assessing the burden of family history of cancer in the U.S. population, and no general population estimates of reporting error for the major cancers that affect families. The results on reporting accuracy will be used to determine whether the quality of data is sufficient to justify conducting a comprehensive national prevalence study of family history of cancer. The questionnaire will be administered in a telephone survey of adults, age 25 to 64 years who will be randomly selected from households in Connecticut. Respondents will be asked to report about family structure and cancer diagnoses occurring in their first and second degree relatives. Positive and negative reports of five major cancer sites (*i.e* breast, prostate, colorectal, lung, and ovarian cancers) will be validated for approximately three relatives per respondent through data linkage to state and federal health registries or by review of death certificates and medical records. Living relatives and next-of-kin of deceased relatives may be interviewed as part of the validation process. Information about the accuracy of reports and factors associated with reporting error will help to evaluate the feasibility of conducting surveys on family history of cancer.

Frequency of Response: One-time study.

Affected Public: Individuals or households.

Type of Respondent: Adults, age 25 to 64, who reside in the state of Connecticut and their selected adult relatives over age 25 or the relative's next-of-kin. The annual reporting burden is presented in the table below. The annualized cost to respondents is estimated at $18,671. There are no capital costs to report. There are no Operating or Maintenance Costs to report.

Type of respondents	Estimated No. of respondents	Estimated No. of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Respondents, age 25 to 64	1800	1	0.6179	1112
Adult relatives of respondents or their next-of-kin	5190	0.67	0.2171	755
Total				1867

Request for Comments

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB

Written comments and/or suggestions regarding the items(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Louise Wideroff, Project Officer, Applied Research Program, National Cancer Institutes, 6130 Executive Blvd, EPN 4010, Bethesda, MD 20892, or call non-toll-free number (301) 435–6823 or E-mail your request, including your address to *wideroff@nih.gov.*

COMMENTS DUE DATE: Comments regarding this information collection are best assured of having their full effect if received before January 18, 2001.

Dated: December 7, 2000.

Reesa Nichols,

NCI Project Clearance Liaison.

[FR Doc. 00–32234 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Eye Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Eye Council.

Date: February 8, 2001.

Open: 8:30 am to 11:30 am.

Agenda: Following opening remarks by the Acting Director, NEI, there will be presentations by the staff of the Institute and discussions concerning Institute programs and policies.

Place: 6120 Executive Blvd., EPN Conference Room G, Rockville, MD 20852.

Closed: 11:30 am to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: 6120 Executive Blvd., EPN Conference Room G, Rockville, MD 20852.

Contact Person: Lois DeNinno, National Eye Institute, Executive Plaza South, Suite 350, 6120 Executive Blvd., MSC 7167, Bethesda, MD 20892, 301–496–9110.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32227 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Advisory Council.

Date: February 1–2, 2001.

Open: February 1, 2001, 8:30 am to 2:00 pm.

Agenda: For discussion of program policies and issues.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, Conference Room 10, Bethesda, MD 20892.

Closed: February 1, 2001, 2:00 pm to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, Conference Room 10, Bethesda, MD 20892.

Contact Person: Robert Carlsen, Director, Division of Extramural Affairs, Nat. Heart, Lung, and Blood Institute, NIH, Two Rockledge Center, Room 7100, 6701 Rockledge Drive, Bethesda, MD 20892, 301/435–0260.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32226 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel (PA–00–004) Mentored Pat.-Oriented Res. Career Development Award, (PA–00–005) Midcareer Investigator Award in Pat.-Oriented Res., (PA–99–087) Mentored Quantative Res. Career Development Award.

Date: January 11–12, 2001.

Time: 7:00 pm to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: Mariott Wardman Park Hotel, 2660 Woodley Road N.W., Washington, DC 20008.

Contact Person: Diane M. Reid, MD, Review Branch, Room 7182, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 8, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32229 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, SCOR in Pathobiology of Fibrotic Lung Disease.

Date: January 11–12, 2001.

Time: 7:00 pm to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, Palladian East Room, 5520 Wisconsin Ave., Chevy Chase, MD 20815.

Contract Person: Robert B Moore, PhD, Scientific Review Administrator, Review Branch, Room 7192, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, Bethesda, MD 20892, 301/435–3541.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 8, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32230 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Inherited Disease Research Access Committee.

Date: January 8–9, 2001.

Open: January 8, 2001, 7 pm to 10 pm.

Agenda: To discuss matters of program relevance.

Place: The Westin Grand Hotel, 2350 M Street, NW., Washington, DC 20036.

Closed: January 9, 2001, 8:30 am to 3 pm.

Agenda: To review and evaluate grant applications.

Place: The Westin Grand Hotel, 2350 M Street, NW., Washington, DC 20037.

Contact Person: Jerry Roberts, PhD, Scientific Review Administrator, Office of Scientific Review, National Institutes of Health, Building 38A, Bethesda, MD 20892, 301 402–0838.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Inherited Disease Research Access Committee.

Date: January 9, 2001.

Time: 3 pm to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Westin Grand Hotel, 2350 M Street, NW., Washington, DC 20037–1417.

Contact Person: Rudy O. Pozzatti, Scientific Review Administrator, Office of Scientific Review, National Human Genome Research Institute, National Institutes of Health, Bethesda, MD 20892, 301 402–0838.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32228 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel.

Date: February 8–9, 2001.

Time: 8:00 am to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Downtown DC, 1155 14th Street, NW., Washington, DC 20005.

Contact Person: Nasrin Nabavi, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID, NIH, Room 2217, 6700B Rockledge Drive, MSC 7610, Bethesda, MD 20892–7610, 301 496–2550.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32222 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: January 26, 2001.

Open: 8:30 am to 12:30 pm.

Agenda: Staff reports on divisional, programmatic and special activities.

Place: National Institutes of Health, 9000 Rockville Pike, Conference Room 10, Building 31C, Bethesda, MD 20892.

Closed: 12:30 pm to adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 9000 Rockville Pike, Conference Room 10, Building 31C, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Chief, Scientific Review Branch, NIH/NIDCD/DER, Executive Plaza South, Room 400C, Bethesda, MD 20892–7180, 301–496–8683.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32223 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.

Date: January 16, 2001.

Time: 1:30 pm to 3:30 pm.

Agenda: To review and evaluate contract proposals.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Phillip F. Wiethorn, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32224 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.

Date: January 10, 2001.

Time: 10:00 am to 12:00 pm.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Phillip F. Wiethorn, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 11, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32225 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel ''Technical and Logistical Support Assistance to the OSP''.

Date: December 13, 2000.

Time: 9:30 AM to 5:00 PM.

Agenda: To review and evaluate contract proposals.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel ''Instrument Development for Assessing Community Factors that Affect Drug Use Consequences''.

Date: December 19, 2000.

Time: 9:30 AM to 5:00 PM.

Agenda: To review and evaluate contract proposals.

Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1439.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: December 8, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32231 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.

Date: December 11, 2000.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Raul A. Saavedra, PhD., Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 8, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32232 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: December 15, 2000.

Time: 1:00 PM to 2:00 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michael Micklin, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, (301) 435–1258, micklinm@crs.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: December 18, 2000.

Time: 1:00 PM to 2:00 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Thomas A. Tatham, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3188, MSC 7848, Bethesda, MD 20892, (301) 435–0692, tathamt@csr.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: December 19, 2000.

Time: 12:00 PM to 1:00 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Daniel R. Kenshalo, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, (301) 435–1255.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 8, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32233 Filed 12–18–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4563–N–19]

Notice of Proposed Information Collection for Public Comment; Admission to, and Occupancy of, Public Housing; Part 960

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 20, 2001.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4238, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–3642, extension 4128, for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Admission To, and Occupancy of, Public Housing: Admission and Tenant Selection Policies, Verification, Notification, Preference, Waiting List, Exemption of Police Officers.

OMB Control Number: 2577–0220.

Description of the need for the information and proposed use: Statute requires HUD to ensure the low-income character of public housing projects and to assure sound management practices will be followed in the operation of the project. Public Housing Agencies (PHAs) entered into an Annual Contribution Contract (ACC) with HUD to assist low-income tenants. HUD regulations, Part 960, provide policies and procedures for PHAs to administer the low-income public housing program for admission and occupancy. PHAs must develop and keep on file admission and occupancy policies including the plan for eligibility of police officers which is approved by HUD. PHA compliance will support the statute; HUD can ensure that the low-income character of the project and that sound management practices will be followed.

Agency form number: None.

Members of affected public: State, Local government; Resident Organizations.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 3,300 respondents, 1 response per respondent, 3,300 total responses, 344,800 (3.300x10.4 hours) total burden hours.

Status of the proposed information collection: Reinstatement, without change.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 12, 2000.

Milan Ozdinec,

Acting General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 00–32219 Filed 12–18–00; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4563–N–20]

Notice of Proposed Information Collection for Public Comment for the Public Housing Development and Mixed-Finance Development of Units; Proposal, Financial Feasibility, Site Information, Turnkey Method, Evidentiary Materials

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 20, 2001.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4238, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–3642, extension 4128, for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Public Housing Development and Mixed-Finance Development of Units; Proposal, Financial Feasibility, Site Information, Turnkey Method, Evidentiary Materials.

OMB Control Number: 2577–0033.

Description of the need for the information and proposed use: Public Housing Agencies (PHAs) must provide information to HUD before a proposal can be approved for development or mixed-finance development. The information on HUD-prescribed forms provides HUD with sufficient information to enable a determination that funds should or should not be reserved or a contractural commitment made. For mixed-finance development, HUD must ensure that the Federal investment of funds in a public housing project is secure and that proposed public housing units are made available only to eligible low-income families. This information collection is necessary for HUD to conduct a subsidy layering analysis pursuant to Section 102(d) of the HUD Reform Act of 1989.

Agency form number: HUD–52483–A, HUD–52482, HUD–51971–I, HUD–51971–II, HUD–52651–A, HUD–52485.

Members of affected public: State or Local Government.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 334 respondents, annually, 23 hours average per response; total annual reporting burden 7,595 hours.

Status of the proposed information collection: Extension, without change.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 12, 2000.

Milan Ozdinec,

Acting General Deputy Assistant Secretary for Public and Indian Housing.

BILLING CODE 4210–33–M

Offer of Sale of Real Property

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 (Exp.)

This collection of information is required for developing a public housing project pursuant to HUD regulations 24 CFR 941. The information will be used to provide HUD with sufficient information to enable a determination that funds should or should not be reserved or a contractual commitment made. This information collection is mandated pursuant to the U.S. Housing Act of 1937. The information requested does not lend itself to confidentiality.

1. In consideration of the sum of $ _____ and other valuable consideration herein called "option price," the receipt whereof is hereby acknowledged, the undersigned (**hereinafter called the "seller"**), being the owner of the property described below, hereby offers and agrees to sell and convey the property to the _____

   _____

   (hereinafter called the "Public Housing Agency" (PHA) or its assignee or nominee for the sum of $ __ _____.

   In the event that a Purchase Agreement (form HUD-51971-II) is executed but closing cannot be consummated for the reasons stated in paragraph 3 or 5 of the Purchase Agreement, the seller hereby agrees that the option price or portion thereof shall be returned to the PHA as provided in the Purchase Agreement.

2. The property is located in (**city or town and county**) _____

   _____

   in the State of _____
   and the property is described as follows (**include street address or other specific location, attach list of any renter occupants by name, address, and number of persons in household, and identify any exceptions to the offer**):

3. This offer shall be irrevocable for a period of _____ days (**insert at least 90 days**) from the date hereof and shall remain inforce thereafter until terminated by the seller by giving 30 days prior written notice to the PHA of such termination. Until the offer is terminated, the PHA or its designee shall have the right to entersaid property for the purpose of appraisal, survey and inspection.

4. The PHA shall evidence acceptance of this offer by executing at least three copies of form HUD-51971-II, Purchase Agreement, a copy of which is attached as an exhibit, and by mailing at least two executed copies to the seller at the address specified below so that the seller may execute both copies and return one to the PHA.

5. Upon closing, the seller shall: (a) convey (**subject to any exceptions specifically set forth in paragraph 2 hereof and liens for current taxes and assessments**) to the PHA or its designee or nominee by general warranty deed a good and marketable fee-simple title thereto, together with all improvements, hereditaments, and appurtenances thereunto belonging, free and clear of all liens, easements, restrictions, delinquent taxes and assessments, leases and encumbrances of any kind, existing or inchoate, with proper release of dower, curtsy, and waiver of homestead rights, if any, together with all of the seller's rights, title, and interest in and to any streets or alleys adjoining or abutting thereon; (b) provide documentary evidence that the zoning permits the PHA's proposed use of the property; and (c) deliver possession to the PHA which shall be responsible for relocation of any renter occupants in accordance with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA).

6. Loss or damage to the property by any cause shall be at the risk of the seller until title has been conveyed to the PHA.

7. The seller agrees, so long as this offer remains in effect, not to sell, mortgage, encumber, or otherwise dispose of the property or any part thereof, or interest therein, except to the PHA.

8. This offer is made voluntarily. The PHA will not use its power of eminent domain to acquire this property if the seller and the PHA are unable to reach an amicable agreement as to the purchase price. The PHA will inform the seller of the amount it believes is the fair market value of the property. If that amount is less than the proposed sale price in paragraph 1 of this Offer of Sale, the seller may withdraw the offer and return the option price to the PHA. The seller understands that the seller is not and will not be eligible to receive relocation assistance under the URA implementing regulations at 49 CFR Part 24, or HUD program regulations. This offer shall be binding upon the seller and the seller's heirs, executors, administrators, successors, and assignees.

Witness	Seller
	Date , 19
Witness	Address

Purchase Agreement

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 ( )

1. The _____ (hereinafter called the "Public Housing Agency" (PHA) agrees to purchase, and _____ (hereinafter called the "seller") agrees to sell, the property described in paragraph 2 of the attached Offer of Sale of Real Property (form HUD-51971-I, executed by the seller on _____ (date)(hereinafter called the "Offer of Sale"), for the sum of $ _____. The Department of Housing and Urban Development (hereafter called "HUD") has, on the basis of its appraisal, determined the fair market value of the property to be $ _____. (If the fair market value of the property is greater than the price specified in paragraph 1 of the Offer of Sale, the seller may withdraw its offer of sale. If the seller withdraws the offer of sale, the option price shall be returned to the PHA). The Purchase Agreement incorporates all conditions stated in the Offer of Sale.
2. The PHA shall specify the place and time of closing, which shall not be more than 90 days after the date of seller's execution of this Purchase Agreement or such later date as may be acceptable to seller; however, if additional time is needed for required zoning changes, the closing date shall be extended for an additional 90 days or such additional time as may be acceptable to seller.
3. Upon closing, the seller shall deliver title to the property in compliance with paragraph 5 of the Offer of Sale. If there are defects in the title which can be remedied by legal action within a reasonable time as agreed to by the seller and the PHA, the seller shall take such action promptly at the seller's own expense and the date for closing shall be extended for such period of time. If there be defects in title which cannot be or are not remedied within such time, this Purchase Agreement shall be terminated, the seller shall return the option price to the PHA and both parties shall be released from all liability for damages by reason of any defect in title.
4. Prior to closing, the site must be determined to meet the requirements of HUD. The seller grants permission to the PHA or its designee to enter said property for the purpose of conducting the following studies or tests which must be completed to make the determination, prior to closing, that the property meets HUD requirements:
5. In the event that title is in compliance with paragraph 5 of the Offer of Sale, but closing cannot be consummated because the studies or tests result in a determination that the site does not meet HUD requirements, or any required zoning changes have not been obtained, one-half of the option price as provided in paragraph 1 of the Offer of Sale shall be returned to the PHA.
6. All expenses of examination of title, transfer tax, and of preparation and recording the Deed shall be paid by the PHA. Payment of the above-stated purchase price shall be made upon transfer of title to the PHA.
7. Current taxes shall be prorated as of the time of closing. Any outstanding special assessments or future installments thereon, remaining unpaid against the property shall be paid in full at time of closing by the seller.

Certification: We hereby certify that to the best of our knowledge and belief no member, officer, or employee of the PHA, no official of the locality (city, county, etc.) and no member of the locality's governing body has any interest, direct or indirect, in this Purchase Agreement or in any proceeds or benefits arising therefrom.

I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate.

Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

PHA Execution		**Seller Execution**	
Signature	Date	Signature	Date
Title of PHA Official		Title	
PHA Address		Address	
Witness		Witness	
Notary		Notary	

Form HUD-51971-I, Offer of Sale of Real Property

Form HUD-51971-II, Purchase Agreement

1. **Purpose:** A Public Housing Agency (PHA) is responsible for selecting a site or property for its proposed public housing project under the conventional and acquisition methods. As stated in the form HUD-51971-I, Offer of Sale of Real Property (**Offer of Sale**), the offer is voluntary and the PHA will not use its power of eminent domain to acquire the property if the seller and the PHA are unable to reach an amicable agreement on the purchase price. Paragraph 1 of the Purchase Agreement indicates the amount HUD believes is the fair market value of the property. As a consequence of these disclosures, the purchase is not subject to any of the policies of Title III (Uniform Real Property Policy) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) and the seller is not eligible for relocation assistance. Renter-occupants of the property are, however, eligible for relocation assistance under Title II (Uniform Relocation Assistance) of the URA. All documentation evidencing the voluntary nature of the transaction, e.g., invitation, newspaper and other listings, etc., must be retained by the PHA. The form HUD-51971-II, Purchase Agreement, is to be used by the PHA to indicate the amount which the PHA is authorized to pay to purchase the site or property and to identify any studies or tests required to determine if the site or property meets HUD requirements.

2. **Prepared By:** The form HUD-51971-I, Offer of Sale, is completed by a prospective seller. The form HUD-51971-II, Purchase Agreement, is prepared by the PHA and executed by both the PHA and the seller. Adaptations required by state or local law may be made to forms HUD-51971-I and HUD-51971-II with the approval of the HUD Office Counsel.

3. **Number:** At least three executed copies of the form HUD-51971-I, Offer of Sale, and form HUD-51971-II, Purchase Agreement.

4. **Distribution:** As an attachment to its PHA proposal, a PHA shall submit one copy of the form HUD-51971-I to the HUD Office for each site or property comprising a public housing project to be developed under the conventional or the acquisition methods. One copy of the forms HUD-51971-I and 51971-II shall be an attachment to the PHA's submission of the site acquisition documents. If there are renter occupants on the site, and if delays in closing beyond 30 days of PHA execution of the Purchase Agreement are anticipated (**due to zoning changes, site studies, HUD Office approvals, etc.**), the PHA should submit, with its PHA Proposal, a request for HUD Office approval of an appropriate specified extension of time for providing the required relocation notices.

5. **PHA Instructions Concerning Preparation:**

A. Form HUD-51971-I, Offer of Sale of Real Property

Paragraph 1. In the first space state the dollar amount of the consideration. In the second space state the legal name of the PHA. In the third space state the seller's asking price for the property described in paragraph 2.

Paragraph 2. In the first space identify the city or town and county or equivalent political subdivision in which the property is located. In the second space identify the State (**or equivalent**) in which the property is located. Describe the property in the large space, beginning with the street address or other specific location. Also in this space identify any exceptions to the offer and list any renter occupants by name, address, and number of persons in the household. Use a continuation page if required.

Paragraph 3. Insert a time period of at least 90 days taking into consideration time necessary for any anticipated special requirements such as site studies or zoning changes.

Signature Area. The seller's signature and typed name, date and address should be included in this area with the signatures of two witnesses who have seen the seller sign. Space is also provided for notarization or acknowledgement if required by local law.

B. Form HUD-51971-II, Purchase Agreement

Paragraph 1. In the first space state the legal name of the PHA. In the second space state the name of the seller. In the third space state the date the seller signed the Offer of Sale (form HUD-51971-I) and attach a copy of the Offer of Sale to the Purchase Agreement. In the fourth space insert the amount authorized by the HUD Office as the purchase price. In the fifth space indicate the amount determined to be the fair market value of the property by HUD. If the proposed sale price in paragraph 1 of the Offer of Sale of Real Property (HUD-51971-I) is less than the HUD determined fair market value, the seller may withdraw the Offer of Sale and return the option price to the PHA.

Paragraph 4. In the space provided identify any studies or tests required to be completed prior to closing to make the determination that the property meets HUD requirements.

Paragraph 7. The second provision, that the seller pay any outstanding assessments, is based on the assumption that the value of any improvements for which the assessment is made has been included in the HUD-approved purchase price of the property.

Signature Area. The first signature is that of the authorized PHA official and signifies the PHA's acceptance of the seller's offer, with or without changes in the price and with or without the specified studies or tests. The second signature is that of the seller and confirms that there is an agreement. Both signatures attest to the certification immediately preceding the signature area. The signatures of two witnesses are required for each party to the agreement and spaces are provided for any locally required notarization or acknowledgement.

Guide Form of Turnkey Developer's Packet

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 (Exp. [illegible])

1. **Purpose.** This form provides a potential turnkey developer with all the information necessary to prepare a turnkey proposal. It also provides the format for PHAs to request proposals.

2. **Prepared by:** The Request for Proposals and Part I will be prepared by the PHA. Parts II, III and IV may be used as printed. Some of the forms and other material in Part IV must be obtained from the HUD field office. Approval must be obtained for any modifications to the Packet not previously authorized by the HUD field office.

3. **Number:** The PHA shall prepare sufficient developer's packets to provide for distribution to all interested developers.

4. **Distribution:** The PHA shall provide one copy of the completed packet to any interested developer. One copy shall be submitted to HUD along with the PHA proposal.

5. **PHA instructions concerning preparation:** The Request for Proposals (RFP) and Part I, Project Description, are to be completed by the PHA based upon local preferences or requirements. Format sentences are typed in regular type. PHA notes or instructions are typed in another distinctive style and are not meant to be included in the final text.

   The remaining parts may be used as printed here. Part II outlines the general requirements of the program. Part III discusses the proposal contents. Part IV lists the various forms and documents which are attachments to this Packet. Copies of these forms may be obtained from the HUD field office. If quantities are limited, they may be reproduced locally by the PHA along with this Packet.

Requests for Proposals

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 (Exp.)

The _____ will accept proposals for
(PHA Note: Insert Legal Name of PHA)

_____ housing units under the Public Housing Program to be located in
(PHA Note: Insert "Newly Constructed" or "Substantially Rehabilitated")

_____, and known as
(PHA Note: Insert Name of Community and State)

_____.
(PHA Note: Insert Project Number)

Turnkey proposals may be submitted for not more than _____ units to be provided in
(PHA Note: Insert Total Number of Units)

_____ structures. The following is the
(PHA Note: Insert Structure Type (or Types))

maximum number of units for each size by bedroom count:

No. of Bedrooms	Maximum No. of Units	
	Elderly	Family
0	_____	
1	_____	_____
2	_____	_____
3		_____
4		_____
5		_____
6		_____

(PHA Note: Insert number of each size desired.) Delete inapplicable sizes.

The project will also consist of the following maximum amounts and types of non-dwelling space:

Management Space _____ square feet
Maintenance Space _____ square feet
Community Space _____ square feet

(PHA Note: Insert the maximum amount calculated for each type of space.) If proposals are submitted for less than the total number of units requested, non-dwelling space will be subject to limitations stated in the Developer's Packet.

Turnkey proposals must be received by _____ of _____ at the
(PHA Note: Insert Time) (of Deadline and Date of Deadline)

address identified below. Turnkey proposals received after the deadline will be returned to the developer without being considered.

Interested developers should obtain a Turnkey Developer's Packet, which provides detailed project information and submission requirements

from _____ _____
(PHA Note: Insert Name of PHA Official) (PHA Note: PHA Name and Address)

_____.
(PHA Note: PHA Telephone Number)

Guide Form of Turnkey Developer's Packet

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 (Exp.)

Introduction

The United States Department of Housing and Urban Development (HUD) is providing financial assistances to this Public Housing Agency (PHA) to develop a low-income housing project pursuant to Sections 4 and 5 of the United States Housing Act of 1937. The PHA has selected the Turnkey method to develop the housing identified in this Turnkey Developer's Packet (Packet).

Under the Turnkey method, developers submit proposals in response to a Request for Proposals (RFP) from the PHA. The proposals that meet the requirements of this Packet are reviewed, rated, and ranked by the PHA. The highest rated turnkey proposal which represents the best "total package" is submitted to HUD for approval. After HUD approval of the turnkey proposal, the developer's architect prepares the preliminary design and working drawings and the construction specifications for PHA and HUD approval.

Prior to start of construction of rehabilitation, the PHA and the developer execute a Contract of Sale under which the PHA agrees to purchase the completed project from the developer for a specified price. The developer is fully responsible for all development and construction activities, such as purchasing sites or properties, completing all site improvements (including structures), obtaining utility hook-ups and local building permits and approvals, and obtaining construction financing. After satisfactory project completion, the PHA purchases the project from the developer.

The completed project will be owned and managed by this PHA to provide rental housing for low-income households. The structures, housing units, and non-dwelling facilities shall be designed to provide a wholesome living environment. Emphasis shall also be placed on durable construction, efficiency and economy of maintenance, energy conservation, and suitable recreation space to enhance a wholesome living environment, over the thirty-year term of the PHA's permanent financing for purchase of the project.

In order to be considered by the PHA and HUD, turnkey proposals must comply with the program and submission requirements identified in this Packet. Accordingly, interested developers should review the project description (Part I), the program requirements (Part II), the turnkey proposal content (Part III) and the required program documents and forms (Part IV), prior to preparing and submitting a turnkey proposal to the PHA.

Interested developers must submit their turnkey proposals to the PHA by the deadline date identified in the RFP. Turnkey proposals that are not received by the deadline, or which are determined to be incomplete or non-responsive will not be considered by the PHA. Any questions that you may have should be directed to the individual identified in the RFP.

Part I. Project Description

PHA Instructions: This Part shall be completed by the PHA to provide specific details about the proposed project. The PHA shall ensure that the information and requirements stated in this part comply with the Public Housing Development Regulation (24 CFR 841), The Public Housing Development Handbook (HB 7417.1 Rev-1), related state and local building requirements, and special regional requirements identified in accordance with Handbook 7417.1, Chapter 3, par. 3-143 and agreements reached by the PHA and HUD at the project planning conference.

1. **Community.** Identify the name of the community for which the housing project is proposed. State whether or not the community is a Community Development Block Grant (CDBG) recipient that has an approved Housing Assistance Plan (HAP).
2. **Site Location.** Identify the general locations for assisted housing stated in the HAP, and any local preferences for sites (e.g., CDBG Activities, Neighborhood Preservation Areas). For communities not covered by a HAP, state any local preferences for sites in areas that are consistent with the public housing site and neighborhood standards and local planning and housing development activities.
3. **Housing Type.** State whether the proposed housing is to be newly constructed or substantially rehabilitated.
4. **Housing Units.** Identify the number of units for each structure type and household type by number of bedrooms as follows:

	Number of Bedrooms								
	Elderly			Family					
	0	1	2	1	2	3	4	5	6
Elevator									
Detached									
Semi-Detached									
Townhouse/Row									
Walk-up Apartment									
Total Units									
Handicapped Units Included in Above*									

*Identify the number of units to be designed specifically for use by handicapped individuals.

The number of units identified above shall not vary from the unit distribution identified in the area office invitation for a PHA proposal. In the case of a project involving **Substantial Rehabilitation** provide a statement that:

A. The total number of units for elderly and family households are maximum amounts;

B. The number of units by structure type are preferred, but the PHA will consider substitution of less expensive structure type (e.g., townhouse/row instead of detached) if appropriate for household type provided that the number of units does not exceed the totals shown for a specific number of bedrooms;

C. If the larger units (number of bedrooms) are not available, a one-for-one substitution of smaller units will be consistent with the applicable housing assistance plan; and

D. The PHA will give preference in selecting turnkey proposals to those proposals that most clearly adhere to the proposed distribution.

5. **Special Building Requirements.** State any local preferences or building requirements or limitations. These may include such items as:

A. Security Systems (access, surveillance, standby power, etc.);
B. Central TV Antenna System;
C. Same key for both housing unit door and mail box;
D. Design requirements to complement neighborhood architecture and standards;
E. Energy Conservation Requirements;
F. Air Conditioning Systems;
G. Building Height Restrictions;
H. Number of buildings and distribution of unit sizes (number of bedrooms) among buildings; and
I. Space for child care which meets local standards and codes.

6. **Special Site Requirements.** State any local preferences or building requirements or limitations. This may include such items as:

   A. Preference or requirement for more than one site

   B. Limitation on number of units per site by bedroom size

   C. Parking Requirements - Number of spaces outside, inside, covered, for handicapped, and parking space per dwelling unit ratio

   D. Recreation space and equipment

   E. Accessibility to commercial areas, churches, schools, transportation

   F. Reference site and neighborhood standards in Part II, Section 3

   G. Statement that PHA will not pay for off-site work to bring utilities to site unless it is local practice and developers normally pay costs of extending utilities for privately owned projects.

7. **Prototype Costs.** State that costs for dwelling construction and equipment (defined in Part II of this packet) are limited by law to no more than 10 percent above the published amount for the size and structure type for the area. Indicate the applicable prototype costs for this project and the date they were published in the *Federal Register* (a legible photocopy of the appropriate *Federal Register* page may be used instead of the following table, if desired).

	Bedroom Size						
	0	1	2	3	4	5	6
Detached	$	$	$	$	$	$	$
Row	$	$	$	$	$	$	$
Walk-up	$	$	$	$	$	$	$
Elevator	$	$	$	XXX	XXX	XXX	XXX

Insert a statement that HUD will adjust the prototype cost base for the project (using a commercial cost index) to recognize actual changes (increases or decreases) in construction costs from the effective date of the unit costs published in the *Federal Register*. This is done for comparison purposes only at early stages of processing. The developer's costs should always reflect current conditions.

8. **Utilities.** State the utilities preferred for the project. Enclose the HUD prepared form HUD-51994. Indicate that any other proposed utility combination and heating and cooling systems must be demonstrated to be the most cost effective on the bland form HUD-51994.

9. **Non-Dwelling Space.** This section should be a detailed statement of the requirements and limitations for non-dwelling space such as a community rooms*, maintenance and office space and space for child care facilities, health care facilities, or congregate dining facilities, if justified. If there is a requirement for several sites, the proration or consolidation requirements for the non-dwelling space must be clearly defined. The PHA may require a separate proposal for part or all of this space especially for proposals for less than the total number of units requested.

   *Includes recreation or hobby rooms, but not hallways, stairways, mail rooms, boiler rooms, closets, lobby, or laundry.

10. **Special Project Requirements and Instructions.** This section should include any other information, requirements or instructions pertaining to this project. Examples of items are:

    1. Whether staged construction will be allowed.

    2. Any dwelling or non-dwelling installed equipment to be furnished by the PHA and its estimated cost.

11. **Proposal Evaluation Criteria.** The standard rating procedure is described in Part IV. If the PHA desires to use the optional procedure, the additional criteria and the point value to be assigned shall be described in this section.

12. **Proposal Instructions.** Provide specific details for submitting proposals, such as:

    A. The deadline time and date for submitting proposals. Proposals received after the deadline will not be considered.

    B. The official address for submitting proposals.

    C. Statement that proposals must be complete. The PHA will determine if any omission makes the proposal "non-responsive". A proposal is considered to be "non-responsive" if critical information is mission or the proposal represents a major deviation from this packet. In such cases the developer will be notified, the reason stated, and the proposal will not be considered by the PHA. In the event of minor omissions, the PHA may give the developer additional time to submit the missing information. A minor omission is one which generally will not affect any of the proposal evaluation criteria considerations.

    D. Statement that all requirements for Part II of this packet must be considered in developing the project.

E. Procedures for sealed envelope submissions. Although proposals will be opened after the deadline, a selection will not be announced until all proposals have been rated under the proposal evaluation criteria and HUD approval has been obtained. A proposal is not a bid and price is only one element to be considered.

F. Number of copies of proposals required.

G. Reference project number assigned to the project.

Part II. General Program Requirements

Section 1. General

Introduction. This part explains the general program standards and policies and the statutory requirements related to the development of public housing. These requirements are applicable to all turnkey proposals. Developers are advised to review this part thoroughly to ensure a complete understanding of their responsibilities. The regulations for this program may be found at 24 CFR 841 and the applicable HUD Handbook is 7417.1 Rev-1.

1. **State and Local Requirements.** The developer must comply with all State and local laws and ordinances relating to the development of a project. This includes State and local requirements relating to employment, obtaining bonds and licenses, and complying with building codes and zoning requirements.

2. **Prevailing Wage Rates.** Development related contracts entered into by the developer provide for the payment of prevailing wages.

   a. **Architects and Technicians.** All architects, technical engineers, draftsmen and technicians employed in the development of the project shall be paid not less than the wages prevailing in the locality.

   b. **Laborers and Mechanics.** All laborers and mechanics employed in the development of a project shall be paid not less than the wage prevailing in the locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276).

3. **Developer's Price.** The turnkey developer's price for the proposed project shall be based on construction costs as of the deadline date specified in the Request for Proposals. The price in the proposal shall be subject to the following modification.

   a. The price shall be subject to reduction to the extent that the HUD appraisal indicates a site value less than the proposed amount for the site and/or to the extent that the proposal substantially exceeds the HUD estimated replacement cost for the project.

   b. The portion of the developer's estimated price for dwelling construction and equipment may not exceed the project prototype cost limits by more than 10 percent.

   c. At each subsequent processing stage, HUD will adjust the price to reflect changes (increases or decreases) in construction costs as identified by a commercial cost index. Any time lost due to the developer's failure to adhere to schedules set by HUD or the PHA will not be recognized.

   d. At the time the Contract of Sale is executed the maximum price that can be approved is the lower of:

      (1) the revised price submitted by the developer, or

      (2) the original proposal price as updated by HUD, or

      (3) the project replacement cost identified by HUD.

   e. The price to be stated in the Contract of Sale shall also be adjusted to reflect the developer's actual interest cost for construction financing.

   f. The estimate of all State and local taxes, other than Real Property taxes and assessment, payable by the developer with respect to the project shall be included in the total developer's price and shall be itemized by type, rate and estimated amount. In the event these taxes are exempt or abated after execution of the Contract of Sale, the amount applicable shall be subtracted from the total contract price at settlement.

   g. The total developer's price shall not include any amount for real property taxes and assessment. The amount paid or payable by the developer as evidenced by the original tax bills or receipts will be added to the contract price at settlement.

4. **Proposal Evaluation System.** Proposals will be selected on the basis of free and open competition. They will be evaluated objectively according to the procedures and criteria set forth in the Proposal evaluation System which is included in Part IV of this Packet and any additional criteria identified in Part I.

5. **Previous Participation.** Developers must successfully complete HUD Previous Participation clearance before selection is approved by HUD. Clearance is initiated by the developer furnishing (as part of the turnkey proposal) completed forms HUD-2530 with respect to the developer and other principals. HUD will review its experience with the developer and the other principals on the projects listed on the forms. An opportunity will be afforded the developer or other principals to explain any adverse information found during the clearance process.

6. **Contract of Sale.** The Contract of Sale, form HUD-53015, included in Part IV of this packet, will be executed by the PHA and the selected developer. Both parties should carefully review the Contract of Sale to ensure an awareness of its requirements. The turnkey developer must certify (as part of the proposal) that the developer has read, understands, and will comply with its provisions.

7. **Insurance Requirements.** Any risks and insurance protection during construction are solely the turnkey developer's responsibility as owner and seller.

Section 2. Fair Housing and Equal Opportunity

Introduction. The fair housing and equal opportunity requirements stated in this section apply to contractors and turnkey developer activities during project development. This includes site selection, award of contracts and sub-contracts, employment of minority and women-owned business enterprises, and employment practices.

1. **Titles VI and VIII and Executive Order 11063.** Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and Executive Order 11063, prohibit discrimination on the basis of race, color, creed or national origin in Federally assisted programs. Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601), prohibits discrimination based on race, color, religion, sex or national origin in the sale or rental of housing.

2. **Section 504 of the Rehabilitation Act of 1973.** Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), prohibits discrimination in Federally assisted programs against any otherwise qualified individual solely by reason of a handicap as defined by the Secretary of Health and Human Services.

3. **Age Discrimination Act of 1975.** The Age Discrimination Act of 1975 prohibits with certain stated exceptions, discrimination in Federally assisted programs against any otherwise qualified individual solely on the basis of age.

4. **Executive Order 11246.** Contracts for construction work are subject to Executive Order 11246 (30 FR 12319) as amended by Executive Order 11375 (32 FR 14303), and applicable implementing regulations (24 CFR 130; 41 CFR 60), rules and orders of HUD and the Office of Federal Contract Compliance Programs of the Department of Labor. Executive Order 11246 prohibits discrimination and requires affirmative action to ensure that employee or applicants for employment are treated with regard to their race, color, religion, sex or national origin. An affirmative action plan pursuant to 24 CFR 135 must be prepared prior to execution of the Contract of Sale.

5. **Section 3 of the HUD Act of 1968.** Projects under development are subject to Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701), which requires that, to the greatest extent feasible, opportunities for training and employment be given lower income residents of the unit of local government or the metropolitan area (or nonmetropolitan county), as determined by the Secretary, in which the project is located; and contracts for work in connection with a project be awarded to business concerns which are located in or owned in substantial part by persons residing in such area.

6. **Minority and Women-Owned Business Enterprise.** Executive Order 11625, Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise, encourages participation in Federal programs by business concerns owned by minority group members. Executive Order 12138, Creating a National Women's Business Enterprise Policy, encourages participation i Federal programs by business concerns owned by women. In accordance with these Executive Orders, program participants (e.g., PHAs, contractors, turnkey developers) shall take affirmative action to encourage participation by businesses owned and operated by minority groups and women. These affirmative actions may include: conducting outreach programs to expand opportunities for participation by such businesses in the public housing program; providing assistance and guidance to such firms that have demonstrated a desire to participate in public housing development activities; and establishing goals for such businesses, in terms of the dollar value of contracts.

Section 3. Site and Neighborhood Standards

Introduction. Each site proposed for a public housing project must comply with the site and neighborhood standards identified in this section. The PHA and turnkey developer shall make every effort to select sites that will minimize the number of households to be displaced for purposes of developing a public housing project. In addition, proposed sites must comply with all environmental requirements and displacement, relocation and acquisition requirements. These standards should be reviewed by the turnkey developer before a site is selected and a purchase option is obtained.

1. **Section 213 of the HCD Act of 1974.** Each site must be consistent with any applicable Housing Assistance Plan (HAP). Sites proposed for newly constructed or rehabilitated projects must be within the general locations specified in any applicable HAPS. The community's HAP is submitted to HUD as part of the Community Development Block Grant (CDBG) application. A community that is not participating in the CDBG programs may also submit a HAP.

2. **Facilities and Services.** The developer should select project sites to make use of existing and proposed public facilities and services identified in State, local and regional plans. Generally, the locations identified in HAPs should have adequate public facilities and services available or planned for the immediate future.
   a. **Access and Utilities.** Sites must be accessible to public utilities, such as water and sewer, electric, natural gas, and trash collection and must be accessible to vehicular traffic. Access streets and utilities should be available at the boundary of each site in time for project construction or occupancy and should be capable of serving the proposed project.
   b. **Transportation.** Sites must be convenient to public transportation or to places of employment, which provide a range of jobs for low-income workers.
   c. **Other.** Sites must be accessible to social, religious, recreational, educational, commercial, and health facilities that are adequate to serve the intended occupants of the project.

3. **Density.** There is no rigid standard to determine an acceptable level of density. One means of measuring density levels is the land use intensity method provided in the HUD Manual of Acceptable Practices (Handbook 4930.1). The determination of an acceptable density level varies with each community and with each site and consideration should be given to such factors as land costs, topography, planned site use, the number and types of buildings, the anticipated age and number of residents based on the number of bedrooms, local building requirements, and the density prevailing in the neighborhood.

4. **Physical Characteristics.** Each site shall be adequate in size, exposure, and contour to accommodate the number and type of units proposed. The topography and subsurface conditions shall promote economical and efficient development and operation of the project.

   a. **Grades.** Sites with grades exceeding ten (10) percent will significantly increase development and management costs and should be avoided. Sites for housing for the elderly or handicapped with grades exceeding five (5) percent should be avoided unless site development (e.g., sidewalks) will provide for not more than a five (5) percent grade without undue development costs. Low-lying and flat sites should also be avoided unless practical and economical means of surface drainage can be provided.

   b. **Bearing Qualities.** Sites with unsuitable soil bearing qualities for foundations and underground utilities or with excessive rock or shale will increase site improvement costs and should be avoided.

   c. **Earth Slides.** Sites that are exposed to the potential hazard of earth slides should not be selected.

5. **Housing Opportunities.** Sites for public housing projects must comply with the following requirements:

   a. **General.** The site and neighborhood for new construction and rehabilitation projects must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968 and Executive Order 11063.

   b. **New Construction.** The site for new construction projects shall:

      (1) not be located in an area of minority concentration unless,

         (a) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration; or

         (b) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. (An overriding need may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable.);

      (2) not be located in a racially mixed area, if the project will cause a significant increase in the proportion of minority to non-minority residents in the area; and

      (3) promote greater choice of housing opportunities and avoid undue concentrations of assisted persons in areas containing a high proportion of low-income persons.

   c. **Rehabilitation.** Sites for rehabilitation projects shall promote greater choice of housing opportunities and avoid undue concentrations of assisted persons in areas containing a high proportion of low-income persons.

Section 4. Environmental Requirements

Introduction. This section identifies the laws, Executive Orders and regulations relating to environmental protection. The development of public housing projects must comply with these requirements except when excluded.

1. **NEPA.** The National Environmental Policy Act of 1969 (42 U.S.C. 4321) establishes the national policy, goals and procedures for protecting and enhancing environmental quality. The HUD implementing regulation at 24 CFR 50 establishes the policies and procedures for HUD environmental clearances (including procedures for automatic requirements for a Special Clearance or Environmental Impact Statement and criteria for determining when several projects built near each other may be considered as a single action) and establishes categorical exclusions that are not subject to an environmental assessment under NEPA. This does not exempt them from the other requirements identified in this section.

2. **Historic Properties.** The National Historic Preservation Act of 1966 (P.L. 89-665), the Archeological and Historic Preservation Act of 1974 (P.L. 93-291), Executive Order 11593, Protection and Enhancement of the Cultural Environment, and the Procedures for Protection of Historic and Cultural Properties, Advisory Council on Historic Preservation (36 CFR 800). Establish national policy and procedures for protecting properties, sites and artifacts of historic, architectural, or archeological significance listed (or eligible to be listed) in the national Register of Historic Places. These laws and procedures require that proposed projects be reviewed to determine whether they would affect any district, site, building or other structure listed (or eligible to be listed) in the National Register of Historic Places. These procedures require consultation with the State Historic Preservation Officer and may require a determination of eligibility b the Department of Interior and a determination of effect by the Advisory Council on Historic Preservation.

3. **Noise Abatement.** The Environmental Criteria and Standards (24 CFR 51, Subpart B) establish minimum HUD standards to protect citizens against excessive noise in their community and place of residence. This regulation also establishes criteria for determining acceptable notice levels and special requirements and mitigation measures to be followed in normally unacceptable and unacceptable noise zones.

4. **Explosive or Flammable Fuels or Chemicals.** The Environmental Criteria and Standards (24 CFR 51, Subpart C) establish standards indicating how close a project can be located to hazardous operations handling conventional fuels or chemicals of an explosive or flammable nature.

5. **Floodplains and Wetlands.** The Flood Disaster Protection Act of 1973 (P.L. 93-234) and implementing regulation at 24 CFR 55, the National Flood Insurance Act of 1968 (42 U.S.C. 4001), Executive Order 11988, Floodplain Management, and Executive Order 11990, Protection of Wetlands, require, if a project is to be located in such an area, that specific review and notification procedures be followed and that appropriate measures be taken to protect the property, to protect the life and safety of the occupants, and to minimize any harm to the floodplain or wetland.

6. **Coastal Zones.** The Coastal Zone Management Act of 1972 (16 U.S.C. 1451) and the implementing regulation at 44 CFR 123 require that projects to be located in the coastal zone (which includes the Great Lakes) be consistent with the State Coastal Zone Management Program.

7. **Air Quality.** The Clean Air Act (P.L. 90-148), the Clean Air Acts Amendments of 1970 (P.L. 91-604), the Clean Air Act Amendments of 1977 (P.L. 95-95), and the implementing regulations of the Environmental Protection Agency (40 CFR 50, 51 and 52) establish national ambient air quality standards.

8. **Water Quality.** The Federal Water Pollution Control Act of 1973 (P.L. 92-500), the Safe Drinking Water Act of 1974 (P.L. 93-523) and the implementing regulations of the Environmental Protection Agency (40 CFR 120) establish measures to protect the quality of water if a project is to be located in the recharge area of a community's sole water supply.

9. **Fish and Wildlife.** The Fish and Wildlife Coordination Act (P.L. 85-624) requires that HUD consult with the Fish and Wildlife Service (Department of Interior) and the appropriate State agency if the project will affect control or require modifications to any stream or other body of water.

10. **Endangered Species.** The Endangered Species Act of 1973 (P.L. 93-205), the Endangered Species Act Amendments of 1978 (P.L. 95-632) and 43 CFR 870, require that HUD consult with the Department of Interior and the Department of Commerce if the project may affect any species (including its habitat) identified by the Department of Interior as an endangered species.

11. **Toxic Chemicals and Radioactive Material.** HUD Notice 79-33 identifies the contact person for guidance on protection of persons and property from man-made environmental hazards such as toxic chemicals and radioactive materials.

Section 5. Uniform Act and Relocation Requirements

The Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) is not applicable to public housing projects developed under the turnkey method. However, in line with its policy regarding other HUD-assisted activities not covered by the uniform Act, HUD administratively requires that relocation assistance, including advisory services and reasonable moving and related expenses, be provided for eligible residential tenant-occupants (not owner-occupants) who are displaced as a result of turnkey development.

When required, relocation assistance and related payments are provided and financed by the PHA. However, the developer may be required to reimburse the PHA for all or part of the costs for such assistance if the developer fails to provide the PHA with specific information regarding the occupants of a proposed site or property, or to furnish notifications to such occupants in accordance with the PHA's instructions, or to meet any other applicable relocation requirements.

If there are any tenant occupants of the site(s) or property(ies) identified in the turnkey proposal, prior to its preparation and submission, the developer should ask the PHA to provide detailed information regarding the relocation notification requirements.

Section 6. Facilities and Services

Introduction. The developer shall make every effort to select sites that are accessible to existing or proposed public facilities and services. This may not be possible because sites may not be available near required facilities or the facilities may not have the capacity to serve the proposed project. In such instances, necessary facilities and services may be provided to the extent authorized in this section.

1. **Project Non-Dwelling Facilities.** Necessary non-dwelling space and equipment may be provided for management, maintenance and community activities and may be included in the development cost of a public housing project provided that the amount of space does not exceed the limitations identified below. These facilities may be provided on a project-by-project basis or as central space for several closely situated public housing projects operated by the PHA. Developers should review Part I of this packet for the specific PHA requirements for this project.

a. **Management Facilities.** General purpose office space and equipment may be required by the PHA to perform administrative functions. Space for necessary facilities may be provided not to exceed the following limitations:

Number of Public Housing Units Served	Maximum Management Space Allowed (sq. ft.)
0-15	150
16-50	325
51-100	500
101-150	600
151-200	775
201-300	1000
301-400	1200
401-500	1400

b. **Maintenance Facilities.** Space and equipment may be required to perform operation and maintenance activities. Included are facilities for a central repair shop and storage of tools, parts and outdoor equipment (e.g., lawn mowers, snow blowers, and maintenance vehicles). Space for necessary maintenance facilities may be provided not to exceed the following limitations:

Number of Public Housing Units Served	Maximum Maintenance Space Allowed (sq. ft.)
0-15	125
16-50	400
51-100	800
101-150	1100
151-200	1400
201-300	1900
301-400	2300
401-500	2700

c. **Community Facilities.** Community space and related equipment may be required to provide social and recreational opportunities for project occupants. Included are such facilities as game rooms, meeting rooms or craft rooms. In determining the amount of community space to be provided, consideration shall be given to whether space will be provided for a child care facility and whether such space could be used for both purposes. Space for necessary community facilities may be provided not to exceed the following limitations:

(1) **Projects Designed for the Elderly:**

Number of Public Housing Units Served	Maximum Community Space Allowed
Under 51	25 sq. ft. per unit.
51-100	1,250 sq. ft. for the first 50 units, plus 20 sq. ft. for each additional unit.
101 or more	2,250 sq. ft. for the first 100 units, plus 15 sq. ft. for each additional unit.

(2) **Projects for Family Occupancy:**

Number of Public Housing Units Served	Maximum Community Space Allowed
Under 101	8 sq. ft. per bedroom.
101 or more	800 sq. ft. for the first 100 bedrooms, plus 4 sq. ft. for each additional bedroom.

(3) **Projects for Elderly and Family Occupancy.** The maximum amount of community space for a project to be occupied both by elderly and family households is the sum of the amounts determined in accordance with (1) and (2) above.

2. **Child Care Facilities.** Space may be provided for a child care center for the project occupants if such a facility is not otherwise available, or existing facilities are inadequate, to serve the proposed project. Such space may be provided in addition to the amount allowed for community facilities. Refer to Part I of this Packet for specific requirements.

3. **Health Care Facilities.** In projects for elderly occupancy, space may be provided, if required, for preventive health programs for the project occupants. This may include space for such facilities as examination rooms and health clinics only if they are not accessible in the neighborhood but shall not include general medical care or hospital care facilities such as laboratories and treatment rooms. If health care facilities are necessary, a maximum of five square feet for each unit may be provided. Such space may be provided in addition to the other amounts allowed. Refer to Part I of this Packet for any specific requirements.

4. **Off-Site Facilities.** Off-site improvements and facilities, such as extensions of water and sewage systems and access streets to the site boundary, may be required. The cost for off-site facilities may be included in the developer's price only if it is local practice that a developer or builder normally pays for such facilities when developing comparable privately owned housing. The amount authorized for off-site facilities shall be limited to the Area Office estimate of either the cost of such facilities or the increase in the site value that is attributable to such facilities, whichever is lower. If the cost exceeds the amount that may be approved by the Area Office, the additional amount would have to be off-set by a donation.

5. **Congregate Facilities.** As defined in the Act, congregate housing provides a living environment in which some or all of the dwelling units do not have kitchen facilities. Such housing must have or be connected with a central dining facility to provide wholesome and economical meals for the occupants in a generally self-supporting operation. The space required for a central kitchen and dining facility is in addition to the allowable non-dwelling facilities identified in this section. The amount of space for the dining room shall not exceed fifteen (15) square feet per finer, accommodating one-half of the project occupants at one sitting, and the kitchen shall be adequate to serve the dining facility. The turnkey developer's price may only include the cost of the following:

a. space for the common kitchen and dining facility, including food storage areas;

b. equipment for the central kitchen facility, including cooking utensils, ranges, refrigerators, storage cabinets, dishwashers, and waste disposal equipment, and;

c. furniture and equipment for the central dining facility, including tables, chairs, linen, glassware and eating utensils.

Section 7. Design and Construction Standards

Introduction. This section discusses the design and construction standards applicable to all projects developed for the public housing program. If the standard is optional, Part I will indicate if it is required for this specific project.

1. **Basic Standards.** Projects developed under the public housing program must comply with:

   a. either the HUD Minimum Property Standards (MPS) for New Construction or the HUD Minimum Design Standards for Rehabilitation of Residential Properties. The MPS for multi-family Housing apply to walk-up and elevator structures and sites and are contained in Handbook 4910.1. The MPS which apply to detached, semi-detached and row structures and sites are contained in Handbook 4900.1. An up-to-date copy of the MPS is available for examination in each HUD Regional, Area and Service Office. Copies may be purchased from the United States Government Printing Office, Washington, D.C. 20402. The MPS for Rehabilitation of Residential Properties is Handbook 4940.4 which applies to all types of structures. It may be obtained free of charge from any HUD Office.

   b. HUD environmental requirements and requirements for accessibility and usability by the physically handicapped (24 CFR 40 and 24 CFR 8); and

   c. any applicable local requirements, such as State or local building codes and ordinances.

2. **Local MPS Variations.** The Area Manager may approve variations from the MPS to meet special local conditions for a specific project. Variations may include modifications to design and construction standards, use of alternate building materials and fixtures, and the use of innovative construction methods and materials. In such cases, the Area Manager must determine that the alternate standards or materials will provide for a level of structural soundness, useful life, and economy in maintenance or operation that is at least equivalent to the MPS. Where a variation is expected to be used for future projects on a repetitive basis, the Area Manager should recommend that an appropriate Local Acceptable Standard be established.

3. **Additional Program Standards.** The basic standards identified above provide minimum design and construction requirements. The construction of public housing projects may exceed the basic standards provided that projects do not involve elaborate or extravagant design or materials. For example, increasing the MPS insulation or glazing standard may be required to conserve energy and provide for more economical operations over the projected life of the housing.

   a. **Additional Quality Standards.** The Area Manager is required to develop specific additional quality standards necessary to comply with the requirements of Section 6(b) of the Act. Specifically, the law requires that the design and cost of a public housing project take into account the extra durability required for safety and security and economical maintenance of such housing; the provision of amenities designed to guarantee a safe and healthy family life and neighborhood environment; the application of good design as an essential component of such housing for safety and security as well as other purposes; the maintenance of quality in architecture to reflect the standards of the neighborhood and community; the need for maximizing the conservation of energy for heating, lighting, and other purposes; the effectiveness of existing cost limits in the area; and the advice and recommendation of local housing producers. The additional quality standards for this project may be found in Part IV of this Packet.

   b. **Density.** The density requirements are stated in Section 3 of this Part.

   c. **Non-Dwelling Facilities.** The requirements and limitations for required facilities and services are stated in Section 6 of this Part.

4. **Carpeting.** Carpeting, instead of other types of finished flooring, may be provided only in projects proposed for occupancy by the elderly or handicapped. Carpeting may not be used in bathrooms or kitchens.

5. **Basements.** Unfinished basements may only be provided in public housing projects if the cost of constructing basements was reflected in the published prototype dwelling construction and equipment (DC&E) costs for the area developed by the Area Office. In establishing prototype costs, the Area Office may consider the cost of constructing basements but only in those areas where it is common local practice for moderate income housing.

6. **Parking Spaces.** The number of parking spaces to be provided for a public housing project is generally determined by local building codes and ordinances. In the absence of local parking requirements, the Manual of Acceptable Practices (HB 4930.1) should be used as a guide for determining the number of parking spaces to be provided. Parking spaces, generally, will be provided in the form of parking pads for detached and semi-detached structures, or a parking lot for other structure types, and would be an allowable expense for site improvements (Account 1450.1).

   a. **Highrise Elevator Structures.** Parking spaces for the occupants of highrise elevator projects may be included as an integral part of the structure. This may be necessary to comply with local requirements or to provide for economical construction of the proposed project because of the limited availability or high cost of acquiring adjacent land solely for a parking lot. In such instances, parking spaces may be provided in a basement or sub-basement garage and would be an allowable expense for site improvements (Account 1450.1).

   b. **Detached and Semi-Detached Structures.** Garages or carports (as distinguished from parking pads) are occupant storage spaces and must be included in dwelling construction (Account 1460). One-car garages or carports for a specific project being developed as scattered site housing may be provided if this can be accomplished within the prototype dwelling construction and equipment cost limitation.

7. **Air Conditioning.** Air conditioning systems may be provided in public housing projects. This may be necessary to provide flexibility in the design and layout of the housing units, provide for a healthy living environment, assure continued occupancy,

and prevent premature obsolescence. Although air conditioning may be desirable, it is not required unless specified in Part I of this Packet.

8. **Utilities.** It is important that the best types and utility combinations be selected. If the best system is not installed initially, the cost of converting to another system at some later date is usually prohibitive. All selected utilities must be available in time for project construction or occupancy.

   a. **Utility Analysis.** The PHA will provide a completed Comparative Analysis of Utility Costs (Form HUD-51994) for the proposed project with this Packet.

   b. **Utility Selection.** The utility combination identified by the PHA shall be selected unless the developer can demonstrate that a more efficient and economical combination is available. If the developer wishes to propose an alternative combination, the developer must prepare and submit with its proposal a revised Form HUD-51994.

   c. **Individual Non-Dwelling Meters.** Utilities for non-dwelling facilities (e.g., maintenance, management and community space) shall have meters separate from residential meters.

9. **Solar Energy.** The developer shall make use of solar energy, if it is economical to do so. Solar energy systems are required only if stated in Part I of this Packet. Any addition, alteration, or improvement to an existing or new structure designed to use solar energy to reduce the demand for other energy sources may be considered.

   a. **HUD Standards.** The Intermediate Minimum Property Standards for Solar Heating and Domestic Hot Water Systems (Handbook 4930.2) identifies various types of active and passive systems that may be considered. A solar heating or domestic hot water system may be approved only if an operational conventional system will be provided as a "back-up".

   b. **Allowable Project Costs.** The cost of solar energy equipment is an allowable expense for project development.

      (1) **Site Improvements (Account 1450.1).** The purchase and installation cost of energy generating or collecting equipment shall be included in Account 1450.1. Included are the costs of related structure alterations; distribution systems (e.g., wiring, ducts, piping, pumps, insulation and heat exchangers); storage tanks, rock bin or heat sink elements; and control systems, sensors and logic devices.

      (2) **Dwelling Construction (Account 1460).** The cost of all energy distribution systems within the dwelling unit shall be included in Account 1460. Included are all costs for the conventional "back-up" system, as well as the related dwelling unit costs for the solar heating or domestic hot water system such as wiring, ducts, piping, radiators, grills, dampers and thermostat. In addition, the cost of building construction common to both the solar system and the housing (e.g., sturdier roof framing to support solar collecting equipment) shall be included in Account 1460.

10. **Works of Art.** Works of art, such as sculptures, mosaics or murals, may be incorporated in a public housing project. Selection of the artist is the responsibility of the architect or developer with the approval of the PHA. Works of art may be provided only in common buildings areas or grounds of the proposed project. In selecting art objects, consideration must be given to their appeal and acceptance by project and neighborhood residents. The materials selected should be permanent and capable of withstanding exposure to the elements and preclude the possibility of theft. The cost of all works of art for a specific project shall not exceed one percent of the amount budgeted for dwelling construction and equipment. The cost of art objects that are part of the structure is an allowable expense for non-dwelling construction (Account 1470), otherwise, the cost shall be included in site improvements (Account 1450.1).

Section 8. Prototype Costs

Introduction. Section 6(b) of the Act requires that HUD establish prototype costs at least annually for various structure types and unit sizes in different areas of the country. The prototype costs established by HUD represent the ceiling amounts that may be approved for construction and equipment in the project development budget and construction contract. The Act also provides that the prototype costs established by HUD for any area may be exceeded by up to ten (10) percent if necessary for individual projects.

1. **Federal Register Publication.** The unit prototype cost schedule is published at least annually as a Notice in the Federal Register and is effective upon publication. The published prototype cost schedule identifies the current per unit dwelling construction and equipment cost base don the number of bedrooms and structure types for various geographic areas. The unit prototype cost schedule for a specific geographic area may be revised based on public comments or other evidence that construction costs exceed the limits determined by HUD. Any revisions approved by HUD also will be published as a Notice in the Federal Register.

2. **Prototype Cost Area.** A "prototype cost area" is a geographic area, established by the Area Office, within which there is no appreciable difference in the cost of material, labor, and equipment for the housing construction industry. A separate prototype cost area may be established if construction costs in a community consistently differ from other communities within the same prototype cost area. Prototype cost areas are identified by county, city, or other political boundaries. A map, identifying the current prototype cost areas, is maintained in the Area Office and is available for public inspection.

3. **Structure Types.** The unit prototype cost schedule is established on the basis of the number of bedrooms per unit for the following structure types:

   a. **Detached (D).** A structure which consists of a single living unit and is surrounded by permanent open spaces.

   b. **Semi-Detached (SD).** A structure containing two living units separated by a common vertical wall.

c. **Row Dwelling (R).** A structure containing three or more living units, each separated by vertical walls, and generally having individual entrances and interior stairs.

d. **Walk-Up Apartments (AW).** A multi-level low-rise structure containing two or more living units, each separate horizontally (ceiling/floor), and by vertical walls.

e. **Elevator Structure (AE).** Any high-rise structure for which an elevator is required under the Minimum Property Standards or local building codes.

4. **Dwelling Construction and Equipment Costs.** The construction cost of new housing, for the purposes of establishing prototype costs, includes the cost allowed for dwelling structures (Account 1460) and dwelling equipment (Account 1465). The following is a description of the construction items included in prototype costs:

a. **General Construction.** This includes the costs for:

(1) normal excavation and backfill for dwelling structures, but not the cost for excessive excavation and backfill or site improvements such as grading, installation of utility service, streets, walks and landscaping;

(2) normal foundations but, not the cost of special improvements such as pilings, caissons, or underpinnings required for unusual site topography or sub-soil conditions;

(3) structural framing and interior and exterior finish;

(4) dwelling structures, including closets and other occupant storage spaces, and common spaces such as entrances, corridors and lobbies, janitorial closets, and laundry, heating and equipment spaces; and

(5) fixed equipment such as cabinets, cupboards and shelving, including installation.

b. **Plumbing.** This includes all costs relating to domestic gas, water and sewage distribution systems within dwelling structure walls, such as piping, kitchen and bathroom fixtures and accessories, domestic hot-water heaters, circulating pumps, and utility meters or checkmeters.

c. **Heating and Air Conditioning.** This includes all costs relating to air handling and distribution systems, such as furnaces, piping, ducts, radiators, filters, vents, and fans. This applies to costs related to dwelling structures whether such items are within the dwelling structure walls or part of a central heating plant or system. If a central plant will serve both dwelling and non-dwelling areas, a proportionate cost of the structure, equipment, heating mains, and pipe tunnels is also included. The cost of air conditioning systems and equipment is also included where it has been justified.

d. **Electrical.** This includes all costs relating to interior electrical systems from the service drops, such as wiring, receptacles, switches, fixtures and electric meters or check meters.

e. **Elevators.** This includes the cost of elevators and related equipment for high-rise structures.

f. **Other.** This includes a proportionate share of the builder's cost of labor, insurance, Social Security and sales taxes, and the builder's general overhead, profit, and bond premiums. Not included are a turnkey developer's fee, overhead, or interest on construction financing.

g. **Dwelling Equipment.** This includes the cost of ranges, refrigerators, shades, screens, and similar equipment provided in dwelling structures and the installation cost.

5. **Unit Prototype Cost.** The published unit prototype cost represents the current dwelling construction and equipment costs for modest housing that is built in compliance with the MPS and local building codes and requirements and the additional public housing program standards.

6. **Base Project Prototype Cost.** The base project prototype cost is computed by multiplying the then current applicable unit prototype cost by the number of units for that unit size and structure type and then adding the amount for all units in the proposed project.

7. **Prototype Cost Adjustment Factor.** A cost adjustment factor is developed to recognize actual changes (increases or decreases) in construction costs from the effective date of the unit prototype cost (used to determine the base project prototype cost) to the execution date of the contract of sale (turnkey). The cost adjustment factor is based on actual changes in construction cost using the Boeckh's Index. However, if another commercial index (e.g., Marshall Swift's) is customarily used by the Area Office for routine processing, it may be used instead of the Boeckh's Index.

8. **Project Prototype Cost Limit.** The project prototype cost limit is the ceiling amount that may be approved for dwelling construction and equipment (Account 1460 and Account 1465) in the contract of sale. The project prototype cost limit is determined at the time that the contract of sale is to be executed. This is determined by multiplying the base project prototype cost by the prototype cost adjustment factor.

In limited circumstances, it may be necessary to exceed the project prototype cost limit to carry out the objectives of the Act. Section 6(b) of the Act provides that the prototype cost may be exceeded by up to ten (10) percent. If the additional cost does not exceed ten (10) percent, the Area Manager may approve a higher project prototype cost for the following reasons:

a. **Local Building Requirements.** Increases attributable to changes in local building requirements (e.g., codes, ordinances) which were imposed after the unit prototype cost schedule was published.

b. **Minimum Property Standards.** Increases attributable to changes in the HUD Minimum Property Standards or the additional public housing program standards which were imposed after the unit prototype cost schedule was published.

c. **Scattered Site Housing.** Higher development costs are anticipated because the project is being developed as scattered site housing.

d. **Increases During Construction.** Change orders, that are beyond the scope of the construction contract or contract of sale, which are required to provide a necessity, appropriate betterment, or equivalent, for the proposed project.

Part III. Contents of Turnkey Proposal

Turnkey proposals must comply with all requirements of the Turnkey Developer's Packet to be considered by the PHA. Each turnkey proposal shall include:

1. **Form HUD-52651-A.** The proposal shall contain an original of the Site, Design and Cost Report (Form HUD-52651-A) for each individual site (or a site comprising several contiguous parcels having exhibits and information applicable to all parcels). This form must be completed with all attachments and all questions answered. Where more than one site is proposed, a separate Form HUD-52651-A shall be submitted as a summary for the proposed project as a whole.
2. **Developer's Experience.** The developer and the developer's contractor shall provide the following information relating to their housing construction and development experience in connection with:
   a. **HUD projects:** a Previous Participation Certificate (Form HUD-2530), which identifies the project number, location, units, and current development status for all HUD assisted housing projects (e.g., Public Housing, Section 8, Section 202) and HUD insured projects (e.g., Section 221(d) (4), Section 236, Section 207);
   b. **Other projects:** a list of other projects (excluding HUD assisted and HUD insured projects) developed, identifying the number of units, structure type, community, total project cost and current development status; and
   c. **Financial statement:** a Personal Financial and Credit Statement (Form FHA 2417). The PHA will not be authorized to release any financial information, except to the Area Office, without the express written consent of the developer or contractor.
3. **Developer's Certification.** The developer shall submit a written certification which indicates that::
   a. the developer has read and understood the provisions of the turnkey contract of sale; and
   b. if the developer's turnkey proposal is selected, the developer will comply and assure that any contractors or subcontractors employed by the developer will comply with the requirements of the contract of sale.

Section IV. Forms and Documents

The following forms and documents are provided with this Packet.

1. PHA's Proposal Evaluation System
2. Prepared Form HUD-51994 (Comparative Analysis of Utility Costs)
3. Blank Form HUD-51994
4. Form HUD-53015 (Format for Turnkey Contract of Sale)
5. Form HUD-52651-A (Site, Design and Cost Report)
6. Form HUD-2530 (Previous Participation Certificate)
7. Form HUD-5087 (Outline Specification)
8. Program Regulation 24 CFR 841
9. A copy of the locally adopted HUD additional quality standards
10. Handbook 7417.1 REV-1, Chapters 9 and 10 Sections on PHA submission of drawings
11. Form FHA-2417 (Personal Financial and Credit Statement)
12. Form HUD-92800-3 (FHA Underwriting Report) - only if the project involves single family (1-4 family) units

PHA's Proposal Evaluation System

Proposal Evaluation Criteria. The PHA will evaluate and rate each turnkey proposal objectively on the basis of the following criteria:

1. **Developer's Price:** the total developer's price as a percent of the median developer's price for all responsive turnkey proposals;
2. **DC&E Cost:** the developer's dwelling construction and equipment cost as a percent of the base project prototype cost;
3. **Developer's Experience:** the ability of the turnkey developer and contractor, if applicable, to build a housing project of the type and scale proposed, including the number, complexity and location of construction activities currently underway;
4. **Physical Site Characteristics:** the suitability of the site for housing use and freedom from adverse environmental conditions;
5. **Site Plan:** the extent that the site is appropriate for the intended use (e.g., occupants, density) and the site plan provides open spaces, outdoor recreation areas, and promotes economical project construction and maintenance, and minimizes displacement of site or property occupants.
6. **Site Location:** the proximity and accessibility of the site to transportation, employment, recreation and similar facilities and the adequacy of such facilities;
7. **Housing and Employment Opportunities:** the absence of low income or assisted housing concentrated in the proposed neighborhood or area of the community and extent that the developer proposes to employ minority or women-owned businesses in project development activities.
8. **Architectural Treatment:** the degree to which the design, and placement of buildings is aesthetic and complements adjacent development, and the building and unit floor plans and layout provide functional housing arrangements;

9. **Special Design Features:** the degree to which the design incorporates features that provide for efficient project operations, lower maintenance costs, and the safety and security of the occupants;

10. **Energy Savings:** the extent that the design provides for long-term energy savings by incorporating the use of solar energy or other energy conservation features;

11. **Materials and Equipment:** the extent that durable, low maintenance, construction material and equipment will be used;

12. **Overall Project Design:** the extent that the proposed housing, including non-dwelling facilities, meets the design and functional objectives indicated i the Turnkey Developer's Packet;

13. **Other PHA Criteria:** any other objective criteria established by the PHA and identified in Part I of this Turnkey Developer's Packet.

Proposal Rating and Selection. The PHA will rate each responsive turnkey proposal on the basis of the criteria above. If the highest rated turnkey proposal was assigned a zero by the PHA for any criterion, the PHA may select the next highest rated turnkey proposal for which no criterion was assigned a zero.

a. **Standard Rating System.** The standard rating system shall be used if special PHA criteria were not established. (See Part I, Proposal Evaluation Criteria.) The maximum rating under the standard system is 84 points. However, a turnkey proposal must receive a score of at least 50 points to be selected by the PHA based on the following rating procedure:

(1) **Developer's Price.** A turnkey proposal will be considered as average, if the developer's price is between 90 percent and 100 percent of the median developer's price for all responsive turnkey proposals; poor, if the developer's price is more than 100 percent; and superior, if the developer's price is less than 90 percent. Points for developer's price shall be assigned as either superior (10 points), average (5 points), or poor (zero points).

(2) **DC&E Cost.** A turnkey proposal will be considered as average, if the Dwelling Construction and Equipment (DC&E) portion of the developer's price is between 90 percent and 100 percent of the base project prototype cost, poor, if the DC&E cost is more than 100 percent; and superior, if it is less than 90 percent. Points for DC&E cost shall be assigned as either superior (10 points), average (5 points), or poor (zero points).

(3) **Developer's Experience.** The PHA shall evaluate the developer's and, if applicable, the contractor's previous experience in housing construction. Points for developer and contractor experience shall be assigned as either: superior (10 points), average (5 points), or poor (zero points).

(4) **Site and Design Criteria.** The PHA shall evaluate the turnkey proposals for each of the other nine criteria and shall assign points as superior (6 points), average (3 points), or poor (zero points).

b. **Optional Rating System.** The optional rating system shall be used if special PHA criteria were established. The maximum rating under the optional system is 100 points which provide sixteen (16) discretionary points for use by the PHA. Under this system, a turnkey proposal must receive a score of at least 60 points to be selected by the PHA. The sixteen (16) discretionary points shall be distributed among the PHA established criteria and shall be assigned as follows: superior (the number of points, not exceeding 16, assigned to the criterion by the PHA), average (one-half of the maximum number of points assigned to the criterion), or poor (zero points).

Proposal for a Public Housing Project

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 (Exp.)

See Public Reporting Burden Statement on Page 3.

Project Number:	If an ACC for Front-End Funds was executed:	Allocation Area:
P	Loan Authority= $ Contract Authority= $ Date:	☐ Metro Area ☐ Non-Metro Area ☐ PHA inside Central City Allocation Area ☐ PHA outside Central City Allocation Area

Part I—PHA Data

1. Name of PHA:	2. Address of PHA:

3. PHA area of jurisdiction ☐ includes the community for which public housing development assistance is being requested.

4. The required Cooperation Agreements ☐ are executed for the proposed project.

5. A current General Certificate: (a) ☐ is attached (b) ☐ was submitted, dated , and is still valid.

6. The required PHA resolution authorizing submission of this PHA Proposal, etc., (a) ☐ is attached (b) ☐ was submitted, dated

Part II—Proposal Project Summary and Development Schedule

Section A. Project Location

1. Community:	2. County or Other Similar Area:	3. Congressional District(s)	4. Census Tracts/Enumeration District(s)

Section B. Housing Type and Development Method

1. Housing Type and Development Method	9. If Turnkey:	3. Congregate or other special-use housing
(1) Conventional (2) Turnkey (a) New Construction ☐ ☐ (3) Acquisition (b) Rehabilitation ☐ ☐ (c) Existing ☐	(a) ☐ RFP and Developer's Packet is attached. (b) ☐ PHA selected Turnkey Proposal is attached. (c) ☐ PHA certifies that Turnkey Proposal was selected based on an objective rating system using such factors as site location, project design, price and developer experience.	(a) ☐ is (b) ☐ is not proposed. If "Yes" specify use(s) and number of units:

Section C. Dwelling Units by Household Type and Structure Type

As appropriate, enter the number of dwelling units (DUs), proposed for this project by number of bedrooms, structure and household type.

	Column 1	Column 2	Column 3 Total DUs			Column 4 Number of Family and Large Family DUs						Column 5 Number of Elderly DUs		
	Structure Type [1]	No. of Buildings	(a) Total	(b) Family	(c) Elderly	(a) 1-BR	(b) 2-BR	(c) 3-BR	(d) 4-BR	(e) 5-BR	(f) 6-BR	(a) Efficiency	(b) 1-BR	(c) 2-BR
1	D													
2	SD													
3	E													
4	W													
5	E[2]													
6	Totals													
7	Number in Line 6 for Hdcp.													

[1] Structure Types are: D=Detached; SD=Semi-Detached; R=Row or Townhouse, W=Walkup; and E=Elevator
[2] Justification required; See Part III, Item A.4, Density

Section D. Proposed Project Development Schedule

Schedule each processing step for the proposed project in the "PHA Estimate" column by entering the estimated number of calendar days required.

Processing Steps		Number of Calendar Days (1) PHA Estimate	(2) HUD Use
1. Site Documents	(a) PHA Submission		
	(b) HUD Decision	25	25
2. Design Documents	(a) PHA Submission		
	(b) HUD Decision	45	45
3. Construction Documents	(a) PHA Submission		
	(b) HUD Decision	45	45
4. Contract Documents	(a) PHA Submission		
	(b) HUD Decision	15	15
5. Construction Start			
6. Completion or Acquisition			
7.	**Total**		

8. Date by which complete proposal will be submitted:

9. State the earliest option expiration date and identify the applicable site:

form **HUD-52483-A** (5/94)
ref Handbook 7417.1

Part III—Proposal Content

Section A. Proposed Site, Project Description and Construction Cost

1. **One to Four Family Properties:** A scattered site housing project involving one to four family properties is proposed: (a) ☐ Yes, (b) ☐ No. If Yes, the following are attached: (1) ☐ a neighborhood map identifying specific boundaries within which the PHA proposed to acquire sites or properties; (2) ☐ a description of the structural types, unit sizes, and conditions of typical housing in each of the specified neighborhoods; (3) ☐ evidence that vacant sites or existing houses, as applicable to the proposal, are regularly offered for sale within cost limitations; and (4) ☐ for projects involving 1-to-4-family properties, the attached schedule demonstrates that all properties will be acquired by the PHA within one year of ACC execution and identifies the number of units and dates by which property specific site acquisition documents will be submitted.
2. **Site Design and Cost Reports:** (1) Number of sites in proposed project _____; (b) Number of Forms HUD-52651-A attached _____; (c) A Form HUD-52651-A with required exhibits is attached for: (1) ☐ each proposed site and/or (2) ☐ a site comprising several contiguous parcels having common exhibits and information; (d) ☐ a separate Form HUD-52651-A is attached summarizing the proposed project as a whole.
3. **Proposed Construction Cost/Price:** The total construction cost/price proposed is $ _____ , with a per unit cost/price proposed of $ _____.
4. **Density:** (a) ☐ the PHA proposes a project density which meets HUD requirements including those of compatibility for the number and ages of the intended residents; (b) the proposed project: (1) ☐ is (2) ☐ is not a scattered-site project; (c) justification for the use of high-rise structures: (1) ☐ is not applicable, (2) ☐ is attached, or (3) ☐ was previously submitted to the Field Office on _____ (date).
5. **Schools:** A letter from the school board (a) ☐ is attached (b) ☐ is not required.
6. **PHA:** The PHA selected the proposed site(s) to comply with the locations for assisted housing identified in the HUD-approved PHA: (a) ☐ Yes or (b) ☐ Not Applicable.
7. **Facilities and Services:** For the intended residents, the PHA proposes a project for which: (a) ☐ the facilities and services as currently exist, meet or exceed HUD requirements; or (b) ☐ with the addition of the following, the facilities will meet or exceed HUD requirements:

Proposed Facility/Service	Source of Funding	Completion Date	Remarks

8. **Nondwelling Space:** (a) ☐ the project nondwelling space proposed complements the facilities and services referred to in Item 7 above. If nondwelling space is **not** exclusively for the proposed project, an attachment state the extent that (b) ☐ nondwelling space is also for other public housing projects and the applicable amounts and cost of such space and/or (c) ☐ nondwelling space is also for projects under other assisted housing programs.
9. **Utility Combination:** The attached Comparative Analysis of Utility Costs (Form HUD-51994) (a) ☐ is the one prepared by the Field Office or (b) ☐ is a revised one prepared pursuant to requirements.
10. **Housing Opportunities:** (a) ☐ the PHA selected the proposed project site to comply with or exceed HUD housing opportunity requirements and (b) ☐ the following information has been added to the locality map required by the Form HUD-52561-A: (1) the percentage of minority residents for each of the locality's areas of minority concentration and racially mixed areas; and (2) existing and proposed HUD and other assisted housing.
11. **Environmental:** ☐ the PHA proposes a project which complies with or exceeds HUD environmental requirements.
12. **Relocation:** Displacement (a) ☐ is (b) ☐ is not involved. If displacement is involved, (c) an attachment, in addition to that required by the Form HUD-52561-A, identifies: (1) ☐ the type of notice (Notice of Displacement, Notice of Right to Continue in Occupancy, or other notice) proposed to be issued to each occu-pant; (2) ☐ the estimated cost of any required relocation benefits; and (d) the following summarizes potential displacement:

(1) Type of Occupant	a. Total Number	b. Eligible for Assisted Housing	c. Estimated Relocation Cost	(2) Sources of Relocation Cost Funds	
				a. Source	b. Amount
1. Families				1. CDBG	
2. Individuals				2. Public Housing	
3. Business Concerns		xxxxxxxxxxxxxxxxx		3.	
4. Nonprofit Institutions		xxxxxxxxxxxxxxxxx		4.	
5. **Total**				5. **Total**	

Section B. Demonstration of Financial Feasibility

This PHA has demonstrated financial feasibility: (1) ☐ with the aid of operating subsidy or (2) ☐ without the need for operating subsidy, and a Demonstration of Financial Feasibility (Form HUD-52485) or other demonstration pursuant to HUD instructions is attached.

Section C. Professional Assistant to PHA

The following _____ (enter the number) professional service contracts are attached:

1. Service	2. Name and Address of Firm or Individual
a.	a.
b.	b.
c.	c.
d.	d.

Section D. Annual Contributions Contract

Three original, signature copies of the following are attached:

1. ☐ **Form HUD-53010.** Part One of the ACC (Form HUD-53010) signed and dated by the authorized PHA official. (Part Two should not be returned.)
2. ☐ **Forms HUD-274 and HUD-51999.** The Designation of Depository for Direct Deposit of Loan or Grant Funds (Form HUD-274) and the General Depository Agreement (Form HUD-51999) signed and dated by the authorized PHA official and bank representative.
3. ☐ **Forms HUD-9204, HUD-52250 and HUD-5412.** The Project Loan Note (Form HUD-9204), the Permanent Note (Form HUD-52250), and the Note Signature Certificate (Form HUD-5412) signed and dated by the authorized PHA official.

Section E. Request for Advances

1. A PHA request for advances (a) ☐ is attached (b) ☐ is not attached.
2. Funds required are for: (a) ☐ planning expenses required for the first calendar quarter following Field Office execution of the ACC ($ _____ and/or (b) ☐ site acquisition and related costs ($ _____).
3. ☐ A detailed explanation of the nature and the amount of each obligation or proposed obligation and the extent that the obligation is necessary for the proposed project is attached.
4. ☐ The PHA certifies that required blanket fidelity bond and any other required insurance coverage is in force.

Section F. Signature

I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate.

Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

Typed Name and Title of Authorized PHA Official:	Signature:	Date:

Public reporting burden for this collection of information is estimated to average 2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Paperwork Reduction Project (2577-0033), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

Do not send this form to the above address.

This collection of information is required for developing a public housing project pursuant to HUD regulations 24 CFR 941. The information will be used to provide HUDwith sufficient information to enable a determination that funds should or should not be reserved or a contractual commitment made. This information collection is mandated pursuant to the U.S. Housing Act of 1937. The information requested does not lend itself to confidentiality.

Demonstration of Financial Feasibility

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0033 (exp.)

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Paperwork Reduction Project (2577-0033), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

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Part 1. Estimate of PHA and Tenant Utility Costs

Project Number:	Public Housing Agency:

Type of Utility or Fuel	Estimated Amount per Unit per Month — PHA Furnished Quantity	PHA Furnished Cost	Tenant Purchased Quantity	Tenant Purchased Cost
a. Water Services. Uses: ☐ Household ☐ Lawn and Shrubs	Gals.	$	Gals	$
b. Sewage Disposal.		$		$
c. Electricity. Uses: ☐ Lighting and Refrigeration ☐ Cooking ☐ Air Conditioning ☐ Domestic Hot Water ☐ Space Heater ☐ Other: (identify)	KWH	$	KWH	$
d. Gas / LP. Uses: ☐ Domestic Hot Water ☐ Cooking ☐ Space Heater ☐ Other: (identify)	Therms	$	Therms	$
e. Oil (Type No.:). Uses: ☐ Domestic Hot Water ☐ Cooking ☐ Space Heater	Gals.	$	Gals	$
f. Heating Labor. (Project Oper. Plant Only)		$		
g. Other Utilities or Services. (specify)		$		$
h. Sub Total - PHA Furnished Utilities.		$		
i. Sub Total - Tenant-Purchased Utilities.				$
j. Total PHA and Tenant-Purchased Utilities. (h plus i)				$

Part 2. Estimate of Anticipated Operating Expenses

	Estimated Amount per Unit per Month
a. Administrative Expense: Salaries (including maintenance supervision), legal, staff training, travel, accounting fees and other administrative expenses.	$
b. Tenant Services Expense: Salaries and other expenses incurred in providing tenant services and the cost of other tenant services activities.	$
c. Utilities Furnished by PHA: Water, electricity, gas, fuel, sewer and other utilities. Also utilities labor and other utilities expense (from item 1h, above).	$
d. Ordinary maintenance and Operation: Labor, materials, and contract costs for all routine maintenance including janitorial and watchman service. Exclude expense applicable to utilities.	$
e. Protective Services: Labor, material and contract costs for protective services.	$
f. Insurance: Fire and Extended coverage, Public Liability, Workmen's Compensation, Employers' Liability, boiler, automobile, burglary, theft and robbery, and Fidelity Bonds, as appropriate.	$
g. Payment in Lieu of Taxes: (Part 3,c (below) minus Part 2,c (above) times 10 percent).	$
h. Other General Expenses: Terminal leave payments, employee benefit contributions, collection losses, and other general expenses.	$
i. Sub-Total (a through h)	$
j. Provision for Nonroutine Expenses and Reserve (10 percent of i)	$
k. Estimated Monthly Operating Expenses (i plus j)	$

Part 3. Estimate of Average Monthly Contract Rent of the Proposed Project	per Unit Month
a. Estimate of Average Monthly Gross Rent	$
b. Estimate of Tenant-Purchased Utilities (from item 1i, above)	$
c. Estimate of Monthly Contract Rent (a minus b)	$
d. Estimate of Average Monthly Contract Rent Based on 97% Occupancy (.97 x c)	$

Part 4. PHA Determination The PHA determines that (mark and complete "a" or "b") :

a. ☐ The project's estimated operating expenses, (item 2k) $_____ **will not** exceed the estimated operating income (item 3d) $_____

b. ☐ The project's estimated operating expenses, (item 2k) $_____ **will** exceed the estimated operating income (item 3d) $_____ by $_____ (item 2k minus item 3d) and an operating subsidy of that amount will be required. To be feasible, this amount cannot exceed item 5d (below).

Part 5. Maximum Allowable Operating Subsidy	per Unit Month
a. The PUM allowable expense level	$
b. *Plus:* The PUM allowable utilities expense level (from item 1h, above, less utilities labor and other utilities expense)	$
c. *Minus:* The PUM contract rental income (item 3d, above)	$
d. Maximum PFS operating subsidy (5a plus 5b minus 5c)	$

Part 6. Signature

I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate. **Warning:** HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

Typed Name and Title of Authorized PHA Official:	Signature:	Date:
	X	

Instructions

1. Purpose. This form shall be used to demonstrate financial feasibility of a project submitted by a Public Housing Agency (PHA) under the Public Housing Program pursuant to 24 CFR 941 and the Public Housing Development Handbook 7417.1 REV-1 and by an Indian Housing Authority (IHA) under the Indian Housing Program pursuant to 24 CFR 905 and the Indian Housing Handbook 7440.1. This form is to be used for all development methods: conventional, turnkey or acquisition. A project may be approved by the HUD Field Office if it is determined that the project is financially feasible based on the PHA's demonstration of financial feasibility pursuant to this form. This form is not to be used by PHAs located in Alaska, Guam, Puerto Rico or the Virgin Islands (See Handbook 7417.1 REV-1). A revision of this financial feasibility test is mandatory if the PHA proposes to change any physical element of the proposed project or its method of management or plans to increase services, and such change would materially increase the estimated operating costs of said project.

2. Prepared By: The form HUD-52485 is prepared by the PHA, with assistance if necessary from the HUD Field Office.

3. Number: Original and one or more copies.

4. Distribution: A PHA shall submit the original to the applicable HUD Field Office with the PHA Proposal for the project and shall retain a copy for its files. A PHA may also be requested by the Field Office to submit additional copies.

5. Instructions for PHA Preparation:

Heading: In the space provided, enter the name and address of the PHA and the project number.

Part 1. - Estimate of PHA and Tenant Utility Costs. Enter the estimated per unit per month (PUM) consumption and PUM cost applicable to PHA furnished and/or tenant purchased utilities. The source data for consumption and cost for electricity, gas, fuel, heating supplies and heating labor is available on Form HUD-51994, Part A, Life Cycle Cost Analysis of Utility Combinations. The PHA shall use the cost associated with the utility combination which HUD has determined is most suitable for the project. Estimates for water and sewage disposal shall be determined separately and entered in Part 1, Items a and b. Costs shown on HUD-51994 will be allocated to PHA furnished or tenant purchased and the results entered into Part 1, Items h and i.

Part 2. - Estimate of Operating Expenses. The PHA shall submit an estimate of its average monthly operating expenses for its first year of operation. This estimate shall be based on the actual expenses of a project which is comparable from a physical and tenancy standpoint and is located in or about the locality of the proposed project. The expense estimates shall be based on current data and shall not include a projected inflation factor.

a. Administrative Expenses. Enter the PUM estimated total administrative expense for the project. Do not include an estimate for audit fees.

b. Tenant Services Expense. Enter the PUM estimated total expense for any tenant services programs projected for the project.

c. Utilities Furnished by PHA. Enter the PUM estimated total expense for utilities to be supplied by the PHA for the project.

d. Ordinary Maintenance and Operation. Enter the PUM estimated total expenses for ordinary maintenance and operation for the project.

e. Protective Services. Enter the PUM estimated total expenses applicable to protective services for the project.

f. Insurance. Enter the PUM annual cost of the required insurance, even though the initial insurance may be charged to the development cost of the project.

g. Payment in Lieu of Taxes (PILOT). Enter the PUM estimated cost for PILOT. PILOT is ten (10) percent of the difference between the estimate of monthly contract rent and the utilities supplied by the project. No entry need be made where the Cooperation Agreement specifically waives PILOT. In the Indian Housing Program PILOT may only be paid on taxable land. If PILOT rate is less than ten (10) percent of shelter rent, entry should reflect such reduced rate.

h. Other General Expenses. Enter PUM estimated total expense for other general expenses (e.g., terminal leave payments, collection losses, employee benefit contribution and in the Indian Housing Program payment for services offered by other government agencies) for the project.

Part 3. - Estimate of Average Monthly Contract Rent of the Proposed Project. The estimate of operating income shall be the projected income for the first fiscal year of operation (without operating subsidy) based upon 97 percent occupancy by a tenant body selected in accordance with PHA regulations (based on Sections 3 and 6(c) (4) of the Act and 24 CFR Part 960 and in the case of the Indian Housing Program 24 CFR 905).

a. Estimate of Average Monthly Gross Rent. To determine the estimate of average monthly gross rents, the PHA shall, first, determine the range of incomes of low-income families residing in rental units in the county or jurisdiction which the project would serve. The families shall be classified by household types (elderly/non-elderly) and by income intervals. The percentage distribution of these incomes shall be recorded in established income intervals. The PHA shall determine the estimated rental income of the project by projecting occupancy which approximates the percentage distribution of families and by applying its current rent determination standards.

The PHA shall submit an analysis, with Form HUD-52485 that will indicate the average monthly gross rent that would result if the PHA selected families with a broad range of incomes representing the distribution of incomes of the eligible population. The PHA shall take into consideration the size of the families most likely to occupy the proposed project if it were constructed at the proposed location. The PHA should use whatever data is available to it to determine the income ranges in the community This could include such sources as census data., CDBG applications, wage surveys, etc. which should be updated to reflect current income levels. The Field Office may have data which could be of assistance to the PHA. If there are not a sufficient number of eligible applicants in a particular range or ranges existing on the PHA's waiting list to fulfill the requirements stated above regarding the tenant body, the PHA must submit its proposed plan to attract applicants whose incomes will permit tenant selection resulting in the project housing tenants with a distribution of income reflecting the distribution of incomes of the potential population in the community. If the PHA proposes to acquire a project occupied in whole or part by low-income families, who will be retained as residents, the estimate of average monthly gross rent shall include the income distribution of those families as well. Based upon the instructions, provide a realistic estimate of the average PUM gross rent.

b. Estimate of Tenant Purchased Utilities. Insert figure calculated in Item 1i of this form.

c. Estimate of Monthly Contract Rent. Subtract tenant purchased utilitties PUM (item 3b) from the Average Monthly Gross Rent (item 3a) to determine the amount to be entered on this line.

d. Estimate of Average Monthly Contract Rent Based Upon 97 Percent Occupancy. Enter the product of Average Monthly Contract Rent (Item 3c) multiplied by 97 percent (.97).

Part 4. - PHA Determination.

a. If the estimated operating expenses for the first fiscal year following the End of the Initial Operating Period (EIOP) does not exceed the estimated operating income (without operating subsidy) for the same period, the project is financially feasible. In this case check block "a" and do not complete the remainder of this form.

b. If the estimated operating expenses exceed the estimated operating income (without operating subsidy), check block "b" and complete remainder of this form to determine if the project will be financially feasible within the limitations of the available Performance Funding System (PFS) operating subsidy.

Part 5. - Maximum Allowable Operating Subsidy.

General. The PUM amount of operating subsidy which can be considered will be based upon whether the proposed project is to be included in the Consolidated Annual Contributions Contract (CACC) or whether the proposed project is to be placed in a separate Annual Contributions Contract (ACC).

Existing PHA/New Project - CACC. If an existing PHA is proposing a new project, and wishes to incorporate the project into its CACC, the maximum allowable PUM amount of operating subsidy which may be used in the determination of the financial feasibility test shall be based on the following:

a. The PUM Allowable Expense Level for the project shall be based upon the current PUM Allowable Expense Level for the CACC recomputed to incorporate the characteristics of the project on all required PFS forms. The recomputation of the Allowable Expense Level shall be accomplished pursuant to Section 990.105 (d) (3) of 24 CFR Part 990, Subpart A, Operating Subsidy - Performance Funding System.

The PHA's current fiscal year PFS shall be recomputed to incorporate the project. In the recomputation no data regarding the project shall be in the Current Year Columns, but shall be shown in the Requested Year Columns. For this recomputation, the estimated date of EIOP for the proposed project shall be the last day of the current fiscal year. For purposes of this recomputation, the project will be considered to be one year old.

b. Plus: The PUM Allowable Utilities Expense Level (do not include Utilities Labor and Utilities Other).

c. Minus: The PUM estimate of the average monthly contract rent based upon 97 percent occupancy.

Existing PHA/New Project to be Placed in Separate ACC or New PHA / New Project. If project is to be in a separate ACC, the maximum allowable PUM amount of operating subsidy which may be used in the determination of the financial feasibility test should be based on the following:

a. The PUM Allowable Expense Level for the proposed project shall be determined to be the same as the current Allowable Expense Level of a PHA already in management which is located in or about the locality of the proposed project, if the proposed project and the comparable PHA are generally alike in physical characteristics and tenancy. Comparison should exclude a project age comparison. If the project is not the first project of the PHA, the comparable PHA might be the PHA itself. The usable Allowable Expenses Level would have been developed pursuant to Section 990.105 of the PFS Regulation. The HUD Field Office shall provide the appropriate Allowable Expense Level upon request.

b. Plus: The PUM Allowable Utilities Expense Level (not to include Utilities Labor and Utilities Other).

c. Minus: The PUM estimate of average monthly contract rent based upon 97 percent occupancy.

d. Initial Operating Subsidy Eligibility. If the proposed project is deemed to be financially feasible, the PUM Allowable Expense Level determined in accordance with this subparagraph will be the basis for the PUM Allowable Expense Level to be used in the project's first fiscal year in management. This PUM will be adjusted by an inflation factor(s) for the intervening years. Instructions for the computation of the first fiscal year PUM Allowable Expense Level are contained in Performance Funding System Handbook 7475.13.

Completion of Part 5.

a. PUM Allowable Expense Level. Enter the PUM computed using the instructions above.

b. PUM Allowable Utilities Expense Level. Enter the PUM cost of PHA furnished utilities shown in Item 1h of this form less Utilities Labor and Other Utilities Expense.

c. PUM Contract Rental Income. Enter the PUM rental income amount as shown in 3d above.

d. Maximum PFS Operating Subsidy. Item 5(a) plus Item 5(b) minus Item 5(c). If this amount is equal to or greater than the deficit (Item 2k minus Item 3d) shown in Item 4b of this form, then the proposed project shall be determined to be financially feasible.

Site, Design and Cost Report

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB No. 2577-0033 (Exp. [illegible])

Public reporting burden for this collection of information is estimated to average 2.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Paperwork Reduction Project (2577-0033), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

Do not send this form to the above address.

This collection of information is required for developing a public housing project pursuant to HUD regulations 24 CFR 941. The information will be used to provide HUDwith sufficient information to enable a determination that funds should or should not be reserved or a contractual commitment made. This information collection is mandated pursuant to the U.S. Housing Act of 1937. The information requested does not lend itself to confidentiality.

Prepare and submit in accordance with the Public Housing Development Regulation (24 CFR 941) and Handbook (747.1J1). A separate report is required for each individual site or a site comprising several contiguous parcels having exhibits and information applicable to all parcels. A summary report is required for the project as a whole. Where necessary, attach a continuation sheet identifying Part, Section and Items continued.

1. Name of PHA:

2. Address of PHA:

3. Project Number: P

4. This report is:
(a) ☐ the Summary Report for the project as whole; and/or
(b) ☐ individual Site Report
Report No. of reports

5. Housing Type and Development Method
(1) Conventional
(2) Turnkey
(3) Acquisition
(a) New Construction
(b) Rehabilitation
(c) Existing

6. Community:

7. County or Other Similar Area

8. Congressional District(s)

9. Census Tract(s)/ Enumeration District(s)

10. Locality Map: For the proposed project as a whole, a map of the locality ☐ is attached identifying each proposed site and the percentage of the population by race in the census tract. Also located on the map are existing and proposed: (a) public transportation lines serving the site, (b) the principal industrial, commercial, or other areas proving employing opportunities for project residents, and (c) public schools, community, recreation, health, shopping and other facilities adjacent to and serving the site.

11. Dwelling Units by Household Type and Structure. As appropriate, enter the number of dwelling units (DUs) proposed by number of bedrooms, structure and household type:

	Col. 1	Col. 2	Column 3 Total DUs			Column 4 Number of Family and Large Family DUs						Column 5 Number of Elderly DUs		
	Structure Type 1/	No. of Buildings	(a) Total	(b) Family	(c) Elderly	(a) 1-BR	(b) 2-BR	(c) 3-BR	(d) 4-BR	(e) 5-BR	(f) 6-BR	(a) Effic.	(b) 1-BR	(c) 2-BR
1	D													
2	SD													
3	R													
4	W													
5	E													
6	Totals													
7	No.In Line 6 For HDEP.													

1/Structure Types are: D = Detached, SD = Semi-Detached, R = Row or Townhouse, W = Walk-up, and E = Elevator

12. Areas and Costs of Dwelling and Non-Dwelling Buildings or Spaces

Identify separately for family and for elderly dwelling and non-dwelling areas and the costs attributable to the areas.	Gross Square Feet		Net Square Feet		Total Cost	
	Family	Elderly	Family	Elderly	Family	Elderly
(a) Dwelling Space						
(b) Non-Dwelling Buildings or Spaces (1) Management						
(2) Maintenance						
(3) Community						
(4) Other (specify)						
(5) Total Non-Dwelling Space						

form **HUD-52651-A** (5/94)
ref Handbook 7417.1

Report Number **of** **Reports for Project Number:**

13. Proposed Project Development Schedule

Schedule each processing step for the proposed project in the applicable column below. Processing Steps	Number of Calendar Days: Turnkey Developer Estimate Column (1)	PHA Estimate Column (2)	Total Column (3)
a. Site Documents Submission			
b. Design Documents Submission			
c. Construction Documents Submission			
d. Contract Documents Submission			
e. Construction Start			
f. Construction Completion			
g. PHA Acquisition of Existing			
h. Total			

14. Certification

a. The PHA, and Developer if a turnkey project, certifies that as applicable, the development and operation of the project will be carried out in compliance with applicable Fair Housing and Equal Opportunity Requirements - - i.e., Title VI of the Civil Rights Act of 1964 and Executive Order 11063, Title VIII of the Civil Rights Act of 1968. Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Executive Order 11246 as amended by Executive Order 11375, Section 3 of the HUD Act of 1963 and Executive Orders 11625 and 12138.

b. For the proposed project as a whole, ☐ a plan is attached including any experience, which addresses:

(1) ☐ Section 3 of the HUD Act of 1968 - - providing opportunities for training and employment of lower-income residence of the unit of local government of the metropolitan area (or non-metropolitan county, as determined by HUD) in which the project is located and awarding contracts for work in connection with the project to business concerns which are located in or owned in substantial part by persons residing in such area;

(2) ☐ Executive Order 11625 and 12138 - - employment minority and women-owned business enterprises to perform work in connection with the development and operation of the project.

Part II - Proposed Site

1. Site Identification and Address

2. Closet Major Intersection

3. Source of Site or Property (Check as applicable and identify)
(a) ☐ HUD (CDBG, U.R. 226, etc.) _____
(b) ☐ Other Fed (VA, etc.) _____
(c) ☐ PHA Owned _____
(d) ☐ City, County, State-Owned _____
(e) ☐ Private-Owned _____
(f) ☐ Other (Identify) _____

4. Dimensions
(a) feet by feet (b) sq. fr. (c) acres

5. Zoning
(a) Identify existing zoning for the site: _____
(b) ☐ Zoning recently changed, evidence is attached
(c) ☐ Zoning is permissive:
(d) ☐ Zoning is not permissive:
(1) zoning required: _____
(2) source of insurance _____
(3) party responsible for obtaining required change:

6. Site Control
Identify current site control and attach evidence
(a) ☐ Form(s) HUD-51971 for conventional and acquisition projects or
(b) ☐ Other form(s) for turnkey projects (identify):
(c) Option expiration date _____

Title Information
To demonstrate that good title can be obtained, attached are: (a) ☐ Title opinion or report and (b) ☐ Recordation plat.

8. Site Survey ☐ is attached

9. For conventional or acquisition projects PHA obtained private owner's offer to sell by:
(a) ☐ PHA advertisement or invitation;
(b) ☐ Owner's advertisement or listing or other voluntary action
(c) ☐ Other

10. Utilities

Service	Currently On-Site (1)	Currently Off-Site (2)	Change Required (3)	Assurance Attached (4)	Explain Change
(a) Sanitary Sewer					
(b) Water					
(c) Gas					
(d) Electricity					
(e) Storm Sewer					
(f) Access Street					
(g) Boundary Streets					
(h)Other (Identify)					

Report Number **of** **Reports for Project Number:**

11. Site Grades: Indicate the Percent of Area for the Site for Each Grade Range

(a) _____ % area w/grades 0 through 1% (c) _____ % area w/grades 6 through 10%

(b) _____ % area w/grades 2 through 5% (d) _____ % area w/grades 11% and above.

12. Rainfall: For Low-Lying and Flat Sites, Indicate Level of Rainfall

13. Flood Hazards: Is the Site Within an Area Identified Within an Area Identified by HUD as Having Special Flood Hazards?

(a) ☐ Yes (elaborate) (b) ☐ No

14. Earthslides: Does the Hazard of Earthslides Exist Either on the Site or on Adjacent or Nearby Land?

(a) ☐ Yes (elaborate) (b) ☐ No

15. Earthquakes: Is the Site a High Risk Area for Earth quakes?

(a) ☐ Yes (elaborate) (b) ☐ No

16. Noise: Is the Site Exposed to Noise in Excess of HUD Standards?

(a) ☐ Yes (elaborate) (b) ☐ No

17. History Similar: Is the Site Located Within a Historic District or Similar Location which may be Subject to Special Environmental Treatment?

(a) ☐ Yes (elaborate) (b) ☐ No

18. Other Environmental Consideration or Comments.A-95 Clearance Attached

☐ Yes ☐ No

19. Unusual, Existing Site Features

(a) ☐ None (f) ☐ Poor Drainage

(b) ☐ Cuts (g) ☐ Retaining Walls

(c) ☐ Fill (h) ☐ Rock Foundations

(d) ☐ Erosion (i) ☐ High Water Table

(e) ☐ Other (specify)

20. Known Subsurface Conditions

21. Relocation

(a) ☐ Vacant (no displacement) or;

(b) ☐ Occupied: (potential displacement)

(c) Types of Occupants	(d) Total Number	(e) Eligible for Assisted Housing
(1) Families		
(2) Individuals		
(3) Business Concerns		
(4) XXXXXXXX???		

(f) ☐ a statement is attached identifying each occupant by (1) name; (2) address; (3) whether owner or tenant; (4) type of occupant; (5) length of occupancy; and (6) dwelling unit size requirements.

(g) ☐ the PHA (or developer in the case of turnkey) certifies that the informational and other notices to occupants will be issued as required.

22. Parcells Comprising Site

(a) Parcel Number	(b) Parcel Address/Identification	(c) Option Exp. Date	(d) Area (Square Feet)	(e) Improvement (1) Type	(e) Improvement (2) Use	(f) Conditions	(g) Asking Price

Report Number	of	Reports for Project Number:

23. Remarks	24. Area of site
	(a) Area to be purchased
	(b) Area to be donated
	(c) Total Area of Site
	(d) Deductions
	(e) Net Buildable Area
	25. Demolition Required
	(a) ☐ None Involved
	(b) ☐ Number of Dwelling Units _____
	(c) ☐ Number of Nondwelling Structures _____

Part III - Proposed Design

Proposed Gross Density	2. No. of Parking Spaces	3. No. of Stories/Buildings	4. No. of Elevators	5. Structural System
(a) _____ DUs per Acre				
(b) _____ Total Population/Acre	6. Floor System	7. Exterior Finish	8. Heating System	
(c) _____ Number of Adults/Acre				
(d) _____ Number of Minors/Acre	9. Air Conditioning	10. Type of Foundation		
(e) _____ DUs		☐ Slab or Grade ☐ Crawl Space ☐ Partial Basement ☐ Full basement		

11. Depth of Detail: The attached project description exhibits fulfill public housing program requirements for (a) ☐ proposal submission; (b) ☐ design document submission; or (c) ☐ construction document submission.

12. Attachment Identification: The attachments to this report are: (a) ☐ identical for and for and represent all sites in this proposed project; (b) ☐ limited only to the property proposed for this site; or (c) ☐ applicable to the various site as described in an attachments' cover sheets.

13. Utility Combination: A revised Comparative Analysis of Utility Costs, form HUD-51994; (a) ☐ is attached; (b) ☐ is not attached.

14. New Construction Project: Attached are (a) ☐ Outline Specification, form HUD-5087; (b) ☐ Site Plan; and (c) ☐ Schematic drawings to identify proposed typical features.

15. Rehabilitation or Existing Housing Project: Attached are: (a) ☐ Preliminary Work Write-ups; (b) ☐ Photographs and (c) (1) ☐ For one-to-four family properties, Underwriting Report, Form HUD-92800.3 (as applicable through Item 22); or (c) (2) ☐ for a property of five more units, Outline Specification, form HUD-5087.

16. Rehabilitation or Existing Housing Project: The following shows the annual income for the property, which includes the indicated equipment and services, over the last twelve months:

16 (a) "As Is" or Before Rehabilitation (Annual Income Last 12 Months)

(1) Number of each type of Unit	(2) Living area (Square Ft)	(3) Composition of Units	(4) Monthly Rent per Unit	Annual Rent (5) Income Received	Annual Rent (6) Received in full Occupancy
			$	$	$
(a) Total Rentals Family Units					
Other Income (Specify)					
Total Other Income					

16 (b) Equipment and Services included in Rent.

Other Items Included in Rent:	
(1) Range (Gas or Electricity)	
(2) Refrigerator (Gas or Electricity)	
(3) Attic Fan	
(4) Laundry Facilities	
(5) Venetian Blinds	
(6) Water (Cold)	
(7) Water (Hot)	
(8) Gas	
(9) Electricity	
(10) Space Heat	
(11) Janitor Service	
(12) Air Conditioning	
(13) Ground Maintenance	
(14) Garbage or Rubbish Removal	
(15) Other (Specify)	

Report Number **of** **Reports for Project Number:**

Part IV - Proposed Construction Cost/Price

Section A. Construction Cost/Developer's Price Description

1. Applicability: The cost/price in this part: (a) ☐ is the Summary Report for Project Number _____ and shows the total construction cost or developer's price for the proposed project as a whole; or (b) ☐ applies only to individual site Report Number _____ of _____ Reports for Project Number _____.

2. Identification: The cost/price is: (a) ☐ for a new construction or rehabilitation project and is based on construction costs as of which is: (1) ☐ the PHA proposal submission date or (2) ☐ the deadline date specified in the turnkey request for proposals; or (b) ☐ for acquisition of existing units.

Section B. Construction Cost/Developer's Price Statement (The following is a statement of proposed construction cost/developer's price.)

Items	(a) Develpoer's Price	(b) PHA Cost	(c) Total Cost
Site Improvements			
1. Unusual Site Improvements			
2. Normal Site Improvements			
3. Total Site Improvements (Account 1450)			
Structures and Equipment			
4. Dwelling Structure (Account 1460)			
5. Dwelling Equipment (Account 1460)			
6. Subtotal D, C and E			
7. Non-Dwelling Structures (Account 1470)			
8. Non-Dwelling Equipment (Account 1475)			
9. Subtotal Non-Dwelling Structures and Equipment			
10. Total Structures and Equipment (Sum of Lines 6 and 9)			
11. Total Construction Cost (Sum of Lines 3 and 10)			
12. Architect's fee - Design at _____ percent.			
13. Architect's Fee Developer at _____ percent. Supervisory: PHA at _____ percent.			
14. Total for all improvements (Sum of Lines 11, 12 and 13)			
15. Cost per Gross Square Foot			$ per sq. ft.
16. Estimated Construction Time			months
Other (Turnkey only)			
17. Construction Financing: Interest on $ at % for months			
18. State or Local Taxes			
19. Title and Recording Fees			
20. Closing Costs			
21. Developer's Fee and Overhead			
22. Total for Other			
Site Acquisition _____ square feet 23. Site/Existing Property (Account 1440.1) $ _____ per sq. ft.			
Total 24. Total Construction Cost/Price			
25. Average Cost per Dwelling Unit (LIne 24 divided by Number of Dwelling Units)			$

Part V - Signature

The information contained herein and in any attachments is true and correct and to the best knowledge of the signatory entities.

Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

Prepared for PHA: (1) ☐ as Turnkey proposal; pr (2) ☐ by PHA Architect/Other (Specify) _____

Name & Address of Entity:	Name & Title of Authorized Representative:
Typed Name & Title of Authorized PHA Official:	Signature of Representative & Date: X

form **HUD-52651-A** (5/94)
ref Handbook 7417.1

Instructions for Form HUD-52651-A Site, Design and Cost Report

1. Purpose: When the PHA is preparing to submit a PHA Proposal for a Public Housing Project (PHA Proposal), Form HUD-52483-A, the Site, Design and Cost Report, Form HUD-52651-A, is the principal attachment used to delineate components of the proposed project. This form is also used to summarize the submission of site documents when the project involves 1-4 family properties under the conventional or acquisition developmental methods.
2. Prepared by: Form HUD-52651-A Site, Design and Cost Report, is prepared by the PHA and its architect under the conventional and acquisition methods. Under the turnkey method, Form HUD-52651-A is initially prepared by prospective developers as part of their turnkey proposal. By signing the form, the PHA formally incorporates it into its PHA proposal which is submitted to HUD. Only one turnkey proposal is permitted for each PHA proposal.
3. Number: Original and one more copies. (Note: The Form HUD-52651-A, itself, calls for attachments).
4. Distribution: A turnkey developer shall submit the original and at least one copy of Form HUD-52651-A to the PHA with all attachments as part of a turnkey proposal. The Developer's Packet may specify a greater number of copies to be submitted to the PHA. A PHA shall attach the original to the original of its PHA Proposal which is submitted to the applicable HUD Field Office and shall retain the copy with a copy of its PHA Proposal in its files. A PEA may also be requested by the Field Office to submit additional copies of its proposal. If the Field Office plans to request any additional copies of the proposal form the PHA, the Field Office should advise the PHA to specify a sufficient number of turnkey proposals in the Developer's Packet.
5. Instructions for Preparation: The Site, Design and Cost Report (Form HUD-52651-A) is to be prepared in accordance with the public housing development regulation (24 CFR-941) and Handbook 7417.1 by either the PHA (Conventional and Acquisition methods) of the turnkey developer (Turnkey method). Except for conventional or acquisition projects involving 1-4 family properties, a separate Form and HUD-52651-A is to be submitted for each individual site or a site comprising several contiguous parcels having common exhibits or other information. In addition, a Form HUD-52651-A (Parts I,IV and V) is to be submitted summarizing the project as a whole.

   For convential or acquisition projects involving 1-4 family properties, a Form HUD-52651-A with Part I, Items 1-11, Part IV and Part V completed shall be submitted summarizing the site documents for each group of properties being proposed. Each part should indicate the total of all properties approved or submitted to date. The following attachments are required with each group of properties submitted to HUD for approval:

   a. Offers of Sale of Real Property and Purchase Agreements (executed Forms HUD-51971-I and II).

   b. Neighborhood Map designating properties previously approved by HUD and acquired by the PHA and the properties currently being submitted for HUD approval.

   c. Appraisal (Form HUD-92800-3)

   d. Work write-ups for properties to be rehabilitated and repair descriptions for those requiring only minor repairs.

   e. A statement of how each property was identified and whether it is currently occupied by an owner or tenant.

   Specific instructions for completing each item follow. If there is insufficient space on the form, a continuation sheet may be used which clearly identifies the material by Part, Section, and item number.

Part I-General

Item 1. State the legal name of the PHA.

Item 2. State the complete mailing address of the PHA.

Item 3. Complete the project number, if known.

Item 4. Check the box which indicates that this is an individual and/or a summary report, and complete the data.

Item 5. Check only one box to identify the proposed housing type and selected development method for the proposed project.

Item 6. State the name of the community in which the project is proposed to be located. A community (formerly referred to as a locality) is defined as municipality or other general purpose political subdivision below the country level (e.g., city, town, township).

Item 7. State the name of any applicable county or similar area of jurisdiction (broader than the community) in which the project is proposed to be located.

Item 8. If known, identify each Congressional district within which the project will be located.

Item 9. If known, identify each Census Tract or Enumeration District within which the project will be located.

Item 10 A locality map which identifies the items listed should be attached to the summary report only.

Item 11 Complete the table as appropriate to indicate the number of dwelling units (DU's) proposed for the site by structure type, household type and number of bedrooms. Also show the number of buildings for each structure type. The sums of family units (Column 4) and those for the elderly (Column 5) should be stated as totals in Column 3 as appropriate. The grand totals should be shown on Line 6. Line 7 should show the number of units included on line 6 for occupancy by the handicapped.

The structure types are defined as follows: (a) Detached (D): A structure which consists of a single living unit and is surrounded by permanent open spaces; (b) Semi-Detached (SD): A structure containing two living units separated by a common vertical wall: (c) Row (R): A structure containing three or more living units, each separated by vertical walls, and generally having individual entrances and interior stairs; (d) Walk-up (W): A multi-level low-rise structure containing two or more living units, each separated horizontally (ceiling/floor) and by vertical walls; (e) Elevator (E): Any high-rise structure for which an elevator is required under the Minimum Property Standards (MPS) or local building codes.

The summary report must indicate the sum total of the dwelling units from all the individual reports.

Item 12. Identify the areas for each of the space types listed. The summary report must indicate the sum total of the areas from all of the individual reports.

Item 13. Enter the estimated number of calendar days in each box depending on the development method. The summary report shall indicate the time estimate which is the longest of the individual reports. Any estimates in excess of the amounts established as Standard Processing Times (SPTs) shall be accompanied by a jurisdiction of the extra time required.

a. Turnkey. The turnkey developer shall enter estimates in column (1). The PHA shall complete the estimate by entering the number of days to complete its part of the processing in column (2). The PHA shall enter the total of columns (1) and (2) in column (3). Enter the information on each lime as follows:

Line a. No entries are made on this line for the turnkey method.

Line b. No entries are made on this line if this stage is to be bypassed; i.e., the design documents are being incorporated with the proposal or the construction documents. Otherwise enter the number of days required form HUD approval of the PHA proposal to developer submission of the design documents to HUD (Col. 2). (The Total (Col. 3) should not exceed the SPT of 60 days).

Line c. Enter the number of days from HUD approval of the design documents (or PHA proposal if the design documents stage is to be bypassed) to turnkey developer submission of the construction documents to the PHA (Col. 1) and PHA submission of the construction documents to HUD (Col.2) (The Total (Col. 3) should not exceed the SPT of 90 or 120 days).

Line d. The PHA (Col. 3) shall enter the number of days from HUD approval of the construction documents to the date of the contract of sale conference (SPT 30 days).

Line e. The developer shall enter the number of days from execution of the Contract of Sale to start of construction (Col. 1) The PHA shall enter the number of days from the contract of sale conference to execution of the Contract of Sale, if not signed at contract of sale conference, (Col. 2).

The PHA shall transfer only the number of days in Col. (2) to Col. (3). There are no SPTs for these actions because the Contract of sale is presumed to be executed at the contract of sale conference and construction start is presumed at the execution of the Contract of Sale.

Line f. The turnkey developer shall enter the number of days required from execution of the Contract of Sale to completion of construction or rehabilitation. (Cols. 1 and 3). (No SPT)

Line g. No entries are made on this line for the turnkey method.

Line h. The PHA shall enter the sum of the horizontal totals in column (3) only.

b. Conventional. The PHA shall enter estimates for each processing stage in column (3) only:

Line a. Enter the number of days from HUD approval of the PHA proposal to submission of the site documents.

Line b. No entries are made on this line if design documents are being incorporated with the PHA proposal or construction documents (design document stage bypassed). Otherwise enter the number of days required

from HUD approval of the PHA proposal to submission of the design documents. (SPT 60 days)

Line c. Enter the number of days from HUD approval of the design documents (or PHA proposal if the design document stage is to be bypassed) to submission of the construction documents. (SPT 90 or 120 days)

Line d. Enter the number of days required from HUD approval of the construction documents to PHA submission of the contact award documents. (SPT 60 days)

Line e. Enter the number of days required from HUD approval of the contract award documents to issuance of the Notice to Proceed. (No SPT established for this step)

Line f. Enter the estimated number of days from issuance of the Notice to Proceed to completion or rehabilitation.

Line g. No entries are made on this line for the conventional method.

Line h. Enter the total of all amounts in column (3) **except line a.**

c. Acquisition. The PHA shall enter estimates for each processing stage in column (3) only:

Line a. Enter the number of days from HUD approval of the PHA proposal to submission of the site documents. Omit this line if the project involves 1-4 family (single-family) units.

Line b-e. No entries required on these lines for the acquisiton method.

Line f. Enter the number of days from HUD approval of the **last** site document to completion of repair work on the last unit.

Line g. for projects involving 1-4 family units, enter number of days required to submit site documents on all properties. (SPT is one year to acquire all properties)

Line h. Enter the total of all amounts in column (3) **including line a.**

Item 14. By signing this Report, the PHA (all methods) and the turnkey developer (Turnkey method) each certifies as started; and to the summary report each shall attach the plan addressing the two areas described.

Part II-Proposed Site

Indicate the report number and project number (if known) at the top of each page.

Item 1. Enter the address of the site or other descriptive information especially if the site is located in a rural area.

Item 2. Major intersecting streets or roads may provide further identification of the site.

Item 3. Check the appropriate box which identifies the present owner of the site.

Item 4. Enter the dimensions if known or an estimate. If dimensions are inappropriate, enter irregular. Calculate the total square foot and acres in the site.

Item 5. Identify the current zoning of the site and check the box indicating whether the zoning was recently changed (if so, attach the evidence) and whether the zoning will permit the intended use or not. If not, indicate the zoning required, the basis for believing that proper zoning can be secured, and the party responsible for obtaining it.

Item 6. Check the appropriate box and attach form HUD-51971-II or other evidence of control or ownership depending on development method. enter the option expiration date or the earliest date if there is more than one parcel involved.

Item 7. Check the two boxes as a reminder that the two pieces of title information are to be attached. Title information shall be in the form of a title opinion or report and a recordation plat to demonstrate that good title can be obtained and that there will be no encumbrances which would interfere with the development of the proposed project. At the time of transfer, title must be good and marketable, and free of any mortgage, lease, lien or other ecumbrances, such as use or building restrictions, zoning ordinances, easements, or rights-of-way which would affect the value or proposed use of site.

Item 8. Check the box as a reminder to submit a survey of the site (to Include all the parcels in this report). A "transit survey" shall be prepared by a surveyor or engineer, drawn to a scale of one inch to forty feet (1" = 40') or larger, showing;

a. the North point, property lines, and dimensions;

b. the community, county, and State in which the property is located, and the lot and block number of the property and adjacent properties;

c. the location and dimensions of all fights-of-way easements;

d. contours indicating current grades;

e. an outline and dimensions of any existing structures;

f. the location and size of utilities; and

g. the location of any known subsurface conditions.

Item 9. For conventional or acquisition projects only, explain how site was located. Check the appropriate box and if lines (a) and (b) are not appropriate, explain the circumstances on line (c).

Item 10. Explain the status of utility services to the site. Check the appropriate box to indicate if the service is presently available (show "Not Applicable" if appropriate). If a change to the existing status will be required i.e., extension, relocation, improvement or increased capacity, explain the change and attach a written assurance from the responsible local agency that funds are available and the work will be completed in time to serve the proposed project.

Item 11. Complete as applicable.

Item 12. Complete as applicable indicating whether any special drainage, etc. requirements are anticipated.

Item 13-17 If any of these conditions are present, explain the circumstances, extent or source of the hazard and what steps will be taken to mitigate potential damaging effects on the project, residents or the environment.

Item 18. Indicate any other environmental considerations applicable to the site and any state or local restrictions above and beyond HUD requirements. Provide a similar as in items 13-17. Attach A-95 clearance if obtained. Advance A-95 clearance is recommended, but not required. HUD will obtain it during its processing if it is not attached.

Item 19. Check the appropriate box (or boxes) which describes any unusual site features. If none, check box (a). Use box (e) to list others not shown such as surface rock, creeks, heavily forested, steep slopes, or power lines.

Item 20. Where any problems are known or suspected, describe the problem and the results of any preliminary examination indicating that the adverse conditions can be overcome. State the nature and extent of required corrective actions.

Item 21. If the site is vacant, check the box (a) and proceed to item 22. If the site is occupied, check the box (b) and provide additional information. Indicate the total number of various types of occupants which would need to be relocated. for purposes of this Report, individuals are single persons without dependents and are not considered families. Indicate "Not Applicable" if any occupant type is not present on this site. Indicating the number of families and individuals in box (e) which are eligible for assisted housing provides a means to estimate relocation expenses without violating their privacy. Check box (f) as a reminder to attach the information statement with the required elements. By checking box (g) the PHA or turnkey developer recognizes the obligation to provide the appropriate notifications to occupants as required by HUD.

Item 22. If the site consists of more than one parcel, devise a number system to identify each parcel on a separate line in column (a). Provide further identification of each parcel in column (b) such as street address, owner's name, or an obvious physical feature and, for properties to be acquired "as is" or rehabilitated, show the year built in column (b). Insert the option expiration date in column (c) calculated from the information on the site control document. Show the total square foot area for each parcel in column (d). In column (e) indicate the types of improvements and future use of any improvements on each parcel by the following codes: In column (e) (1) Type, show D = Dwelling or N = Nondwelling; In column (e) (2) Use, show V = Vacant land (no improvements) A = Use as is, D = will be demolished, R = will be rehabilitated. Enter one or more code letters for each parcel in columns (e) (1) and (e) (2). Indicate by checking column (f) that there are special conditions involving the acquisition of the parcel such as title problems, condemnation expected, relocation involved or any unusual situation, such as currently owned by PHA. Explain the condition in Item 23. Insert the asking price in column (g) from the site control document. If the parcel will be donated, indicate this in column (g) also.

Item 23. Cite any state, local or regional plans (including Housing Assistance Plans) which served as the basis for selecting the proposed site. Also state the reason for recommending exclusion of any parcels from the site and any other acquisition difficulties or conditions. Identify any proposed condition of purchase which should be included in the Purchase agreement, Form HUD-51971-II.

Item 24. Indicate the total square feet and acres acquired by the various means listed. Acquisition by condemnation should be shown as a purchase. Vacated area owned by a public entity should be shown as a donation. The total area of the site should not be greater than the total of lines (a) and (b), and should be the same as the total area of the parcels identified in Item 22, as well as streets, easements and unbuildable land. The result of subtracting line (d) from Line (c) is the net buildable are of the site.

Item 25. Summarize any demolition by checking the appropriate box and indicating the total number of dwelling units or non-dwelling structures to be demolished.

Part III-Proposed Design

Item 1. Enter the various density factors requested based on the dwelling units planned for this site only.

Items 2-10. Provide the information requested for the building or units on this site only.

Item 11. Check the appropriate box which will indicate if design or construction documents are included as part of the proposal instead of schematics. If (b) or (c) is checked, attach the documents required by Handbook 7417.1, complete items 12 and 13 only and proceed to Part V.

Item 12. If the plans, specifications and other attachments are identical for all sites, they need only be attached to the first report. If they are applicable to some sites but not all, enclose a cover sheet identifying each site and they need not be attached to more than one report.

Item 13. If the prepared Form HUD-51994, Analysis of Utility costs, is not to be used, a revised one must be attached and the box checked.

Item 14. For new construction projects only, check the boxes as a reminder to attach the three items shown;

a. a completed Outline Specification (Form HUD-5087)

b. a site plan (schematic drawing) based on available topographical information and known subsurface soil conditions which identifies:

(1) the outline and dimensions of each structure (dwelling and non-dwelling);

(2) the existing and proposed locations of streets, easements, and utilities (e.g. telephone, water, sewerage, gas, electric);

(3) the distance of utilities from the site boundary;

(4) proposed foundations, building grades, drainage swales, and extent of grading required; and

(5) the proposed placement of trees and shrubs, and primary land uses such as placement of buildings, play fields, tot lots, conversational groupings and parking or other paved areas.

c. schematic drawings which identify:

(1) typical building elevations;

(2) typical building floor plans for each structure type, showing the gross square feet of floor area, and the area for each type of non-dwelling space;

(3) typical floor and wall sections, mechanical features and equipment; and

(4) typical unit floor plans for each size and structure type.

Item 15. For rehabilitation and acquisition of existing housing projects, check the boxes as a reminder to attach the three items shown:

a. preliminary work write-ups to describe the extent and nature of work required to rehabilitate or repair each property.

b. photographs of typical interior and exterior buildings and units to illustrate the extent of rehabilitation or repairs required.

c. for one-to-four family properties, Form HUD-92800-3 (as applicable through item 22), or for rehabilitation of properties of 5 or more units, a completed Outline Specification, form HUD-5087.

Item 16. Complete the information requested for each property "as is". Composition refers to number of bedrooms, number of bathrooms, variations in size or other features which may vary the existing rent structure. Check the items of equipment and services included in the existing monthly rental.

Part IV-Proposed Construction Cost/Price

Section A: Construction Cost/Developer's Price Descriptipon

Item 1. Indicate whether this is the summary or an individual site report by checking the appropriate box and completing the data. If only one site is involved, a summary report is not necessary.

Item 2. Check the appropriate box and enter the appropriate date.

Section B: Construction Cost/Developer's Price Statement

1. Enter estimated cost amounts for each line item based on the development method as follows:

a. Turnkey method. The turnkey developer shall enter amounts in column (a) for costs which will incur. The PHA shall enter its costs over and above the turnkey developer's costs in column (b). The PHA shall total the amounts in (a) and (b) for each item and enter it in column (c).

b. Conventional method. The PHA shall enter the estimated costs it will incur for each item in column (c). No entries should be made for items under "Other".

c. Acquisition method. The PHA shall enter its costs in column (c). Line 11 should not be more than 10% of the estimated total development cost of the project. No entries should be made for items under "Other".

2. The amounts for items 1 through 11 are based on the prevailing Davis-Bacon wage rates and include any applicable social security and sales taxes, insurance and bond premiums, and a pro rata share of the contractor's fee (profit and overhead). The cost/price should be stated in terms of actual cost, without contingency, since an amount for contingency will be included in the Development Cost Budget provided to the PHA by the area Office with the proposal approval letter.

3. The "Other" items are to be calculated as follows for turnkey projects only:

a. **Construction Financing.** Indicate the amount of the Construction loan, the interest rate and the number of months of construction time and enter in column (a) the amount for construction financing.

b. **State or local taxes.** Enter an anticipated amount for any state or local taxes except real property taxes. The turnkey price at settlement will be adjusted for any real property taxes paid by the developer during construction.

c. **Title and recording fees, closing costs, and developer's fee.** The amount for these items shall be entered as appropriate.

4. Enter the amount for site acquisition. Since this amount is subject to HUD appraisal, it may be the asking price or an estimate of value.

5. The following is a brief description of the accounts relating to construction costs:

a. **Site Acquisition (Account 1440.1).** The account includes the amounts for land and existing improvements. Any amounts for condemnation and for the value of property donated are also included.

b. **Site Improvements (Account 1450).** This account includes the amount for normal site improvements (e.g., demolition, grading, utility installation, streets, parking and other paved areas, structural playground facilities and landscaping) and the amount for any special improvements required because of unusual site conditions (e.g., abnormal excavation resulting from unusual subsoil conditions, and excess foundation work such as pilings, caissons and underpinnings).

c. **Dwelling Construction (Account 1460).** This account includes the cost for normal foundations, structural framing and interior and exterior finish, closets, other occupant storage areas, and certain common spaces such as entrances, corridors, lobbies, janitorial closets, and laundry, heating and equipment spaces. Costs of major systems and equipment such as plumbing, electrical heating and air conditioning within units are included as well as the cost of elevators and related equipment. Built in equipment such as counters, cabinets, cupboards and shelving are also included.

d. **Dwelling Equipment (Account 1465).** This account includes the cost of ranges, refrigerators, shades, screens or similar equipment provided in dwelling structures.

e. **Nondwelling Construction (Account 1470).** This account includes the costs for management, maintenance and community space or structures. Community space includes social, recreational, health and child care facilities. All necessary built in equipment and plumbing, heating, ventilating and electrical systems are included in these costs.

f. **Nondwelling Equipment (Account 1475)**. This account costs for all movable equipment required for management, maintenance, and community spaces.

Part V-Signature

1. If the form was prepared for the PHA by the turnkey developer or PHA architect or development manager, the preparer shall complete the entity and representative identification and sign and date the form.

2. The PHA official shall provide name, title, signature and date as requested.

3. The signatories complete these entries with full knowledge of the certification being provided and the penalties which may be imposed on persons or organizations for improper or false statements or information.

[FR Doc. 00–32220 Filed 12–18–00; 8:45 am]
BILLING CODE 4210–33–C

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4562–N–10]

Notice of Submission of Proposed Information Collection to OMB Application Kit—HUD Urban Scholars Fellowships Program

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting pubic comments on the subject proposal.

DATES: Comments Due Date: December 26, 2000.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8126, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Jane Karadbil, Office of University Partnerships—telephone (202) 708–1537, extension 5918. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Karadbil.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, an information collection package with respect to a proposed Notice of Funding Availability for the HUD Urban Scholars Fellowship Program. HUD seeks to implement this initiative as soon as possible.

The HUD Urban Scholars Fellowship Program seeks to encourage recent Ph.D.s to undertake research now, and throughout their careers, on research topics of interest to HUD. Approximately 10 fellows will be selected with Fiscal Year 2000 funds.

Submission of the information required under this information collection is mandatory in order to compete for and receive the benefits of the program. All materials submitted are subject to the Freedom of Information Act and can be disclosed upon request. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number. The OMB control number, when assigned, will be announced by a separate notice in the **Federal Register**.

The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35):

(1) Title of the information collection proposal:

Application Kit—HUD Urban Scholars Fellowship Program

(2) Summary of the collection of information:

Each applicant for this program would be required to submit current information, as listed below as:

(A) *SF–424,* Application for Federal Assistance. Include the name and address of the person authorized to execute the grant agreement in Block 5. Include the institution's tax ID number in Block 6. The Catalogue of Federal Domestic Assistance number for the program is 14.518. The form should be signed by the appropriate university official.

(B) Applicant information including:

(1) Title of the research project;

(2) Applicant's name, university and home addresses, university and home telephone and facsimile numbers, and email address;

(3) Applicant's university name, department, mailing address, telephone and facsimile numbers.

(4) Applicant's advisor's name, address, telephone and facsimile number;

(5) Applicant's mentor's name, address, telephone and facsimile number;

(6) Graduate and post-graduate education.

(C) A letter from the chair of the applicant's department that he/she has met all the eligibility criteria.

(D) A letter from the appropriate official that describes the support from the applicant's university.

(E) A letter from the applicant's mentor stating his/her qualifications to be the applicant's mentor and his/her proposed role in the research project.

(F) A one-page abstract of the research project.

(G) A narrative of the proposed research, not to exceed 10 double-spaced typed pages. This narrative must include the following in the following order:

(1) Statement of the problem;

(2) Research design and methodology;

(3) Policy relevance of the research;

(4) How the research will add to the current knowledge base.

(H) A working bibliography of the proposed project.

(I) An annotated bibliography, *e.g.,* a two- or three-sentence annotation for ten to twelve key sources in the working bibliography.

(J) List of the applicant's publications: books, refereed journal articles, chapters contributed to books, articles in published proceedings, and any other articles.

(K) List of presentations made and posters exhibited during the last five years.

(L) Grants and awards received during the last five years.

(M) Teaching load during the last five years.

(N) Four to six letters of reference.

(O) A proposed budget.

(3) Description of the need for the information and its proposed use:

To appropriately determine which applicants should be awarded HUD Urban Scholars Fellowships, certain information is necessary about the applicant's research project and qualifications.

(4) Description of the likely respondents, including the estimated number of likely respondents, and proposed frequency of response to the collection of information:

Respondents will PhDs with academic appointments at institutions of higher education. Fellows will also be expected to prepare and submit progress reports half-way through their fellowships and a final report.

The estimated number of respondents submitting applications is 100. The proposed frequency of the response to the collection of information is one-time. The application need only be submitted once. The estimated number of respondents to the monitoring requirements is 10.

(5) Estimate of the total reporting burden that will result from the collection of information:

Reporting Burden: Number of respondents: 100 for applicants; 10 for monitoring requirements.

Total burden hours: 32 hours per respondent for applications; 12 hours a year per respondent for monitoring requirements.

Total Estimated Burden Hours: 3,320.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, asa amended.

Dated: December 12, 2000.

Susan M. Wachter,

Assistant Secretary for Policy Development and Research.

[FR Doc. 00–32306 Filed 12–18–00 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No.–4574–FA–03]

Announcement of Funding Awards for the Indian Housing Drug Elimination Program for Fiscal Year 2000

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Fiscal Year 2000 Notice of Funding Availability (NOFA) for the Indian Housing Drug Elimination Program (IHDEP). This announcement contains the consolidated names and addresses of the award recipients under the IHDEP.

FOR FURTHER INFORMATION CONTACT: For questions concerning the Indian Housing Drug Elimination Program awards, contact Tracy Outlaw of Native Programs, Denver Program Office, 1999 Broadway, Suite 3390, Denver, CO 80202, telephone (303) 675–1600 (this is not a toll-free number) or the Indian Housing Drug Elimination Program Resource Center at 1–800–839–5561. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: This program provides grants to Indian tribes and tribally designated housing entities (TDHEs) to eliminate drugs and drug-related crime in American Indian and Alaskan Native communities.

The FY 2000 awards announced in this Notice were selected for funding in a competition announced in a NOFA published in the **Federal Register** on Thursday, May 11, 2000 (65 FR 30502). Applications were scored and selected for funding based on the selection criteria in that Notice and a national competition.

The amount appropriated in FY 2000 to fund IHDEP was $22 million in FY 1999 ($11 million) and FY 2000 ($11 for million) in funds was awarded to tribes and TDHEs under the IHDEP. In accordance with Section 102(a)(4)(C) of the Department of Housing Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of the 57 awards made under the national competition in appendix A to this document.

Dated: December 13, 2000.

Milan Ordinec,

Acting General Deputy Assistant Secretary for Public and Indian Housing.

AWARDED APPLICANTS—FY2000 INDIAN HOUSING DRUG ELIMINATION PROGRAM

Applicant name	Contact	Address	City	State	Zip code	Funding	Units
1. Kodiak Island Housing Authority.	Susan Russell	3137 Mill Bay Road	Kodiak	AK	99615	$184,800	308
2. Calista Corporation	Matthew Nicolai	301 Calista Court	Anchorage	AK	99518–3028	695,760	1,338
3. North Pacific Rim Housing Authority.	Olen Harris	8300 King Street	Anchorage	AK	99518–3066	141,600	236
4. Cook Inlet Housing Authority.	Carol Gore	3510 Spenard Rd., St. 201.	Anchorage	AK	99503	274,200	457
5. Bristol Bay Housing Authority.	David McClure	P.O. Box 50	Dillingham	AK	99576	184,800	308
6. Tlingit Haida Regional Housing Authority.	Blake Kazama	P.O. Box 32237, 5446 Jenkins Drive.	Juneau	AK	99803–2237	309,053	612
7. San Carlos Housing Authority.	Eugene Duncan	P.O. Box 740	Peridot	AZ	85542	389,292	888
8. Gila River Housing Authority.	Charles Rogers	P.O. Box 528	Sacaton	AZ	85247	633,000	1,055
9. Navajo Nation	Kelsey Begaye	P.O. Box 9000	Window Rock	AZ	86515	3,000,000	7,446
10. White Mountain Apache Housing Authority.	Victor Velasquez	P.O. Box 1270	Whiteriver	AZ	85941	748,800	1,248
11. Salt River Community Housing Division.	Valjean Calnimptewa.	10177 E. Osborn Road.	Scottsdale	AZ	85256	282,600	471
12. All Mission Indian Housing Authority.	Sharon Herrera	365 West 2nd Street, Suite 203.	Escondido	CA	92025	296,400	494
13. Round Valley Indian Housing Authority.	Clifford Sloan	P.O. Box 682	Covelo	CA	95428	68,400	114
14. Fort Independence Tribe	Vernon Miller	P.O. Box 67	Independence	CA	93526	25,000	12
15. Southern Ute Housing Authority.	Kevin Wilson	P.O. Box 447	Ignacio	CO	81137	111,329	208
16. Seminole Tribe of Florida	James Billie	6300 Stirling Road	Hollywood	FL	33024	280,200	467
17. Nez Perce Tribal Housing Authority.	Cielo Gibson	P.O. Box 188	Lapwai	ID	83540	172,200	287
18. Sault Ste. Marie Tribe of Chippewa Indians TDHE.	Bernard Bouschor	2218 Shunk Road	Sault Ste. Marie	MI	49783	259,200	432
19. Grand Traverse Band of Ottawa and Chippewa Indians.	Dora Willis	2605 NW Bay Shore Drive.	Peshawbestown	MI	49682	36,000	60
20. Bay Mills Indian Community Housing Authority.	L. John Lufkins	12140 W. Lakeshore Drive.	Brimley	MI	49715	123,000	205

AWARDED APPLICANTS—FY2000 INDIAN HOUSING DRUG ELIMINATION PROGRAM—Continued

Applicant name	Contact	Address	City	State	Zip code	Funding	Units
21. Red Lake Reservation Housing Authority.	Jane Barrett	P.O. Box 219, Highway 1 East.	Red Lake	MN	56671	286,200	477
22. Mille Lacs Band of Ojibwe Housing Authority.	Raymond Kegg	43408 Odena Drive	Onamia	MN	56359	81,000	135
23. Leech Lake Housing Authority.	Harry Entwistle	Cass Lake	Cass	MN	56633	282,000	470
24. White Earth Reservation Tribal Council.	Doyle Turner	P.O. Box 418	White Earth	MN	56591	220,800	368
25. Choctaw Housing Authority.	Morris Carpenter ...	P.O. Box 6088	Philadelphia	MS	39350	520,200	867
26. Salish and Kootenai Housing Authority.	Robert Gauthier	P.O. Box 38	Pablo	MT	59855	395,400	659
27. Chippewa Cree Housing Authority.	Donna Hay	RR 1 Box 567	Box Elder	MT	59521	309,000	515
28. Blackfeet Housing	Roger Grounds	P.O. Box 449	Browning	MT	59417	694,200	1,157
29. Qualla Housing Authority ..	Catherine Lambert	P.O. Box 1749	Cherokee	NC	28719	552,600	921
30. Fort Berthold Housing Authority.	Barb Baker	P.O. Box 310	New Town	ND	58763	404,400	674
31. Mescalero Apache Housing Authority.	Sara Misquez	P.O. Box 227	Mescalero	NM	88340	207,600	346
32. Pyramid Lake Paiute Tribe	Norman Harry	P.O. Box 256	Nixon	NV	89424	137,830	263
33. Reno-Sparks Indian Colony Tribal Council.	Arlan Melendez	98 Colony Rd	Reno	NV	89502	104,570	195
34. Absentee Shawnee Housing Authority.	Glenn Edwards	P.O. Box 425, 107 N. Kimberly.	Shawnee	OK	74802–0425	436,200	727
35. Housing Authority of the Choctaw Nation.	Russell Sossamon	P.O. Box G	Hugo	OK	74743	1,107,600	2,130
36. Comanche Nation Housing Authority.	Don Parker	P.O. Box 1671, 216 S.E. ''J'' Avenue.	Lawton	OK	73502	332,400	554
37. Housing Authority of the Peoria Tribe of Indians.	William Blalock	P.O. Box 1304	Miami	OK	74335	259,200	432
38. Chickasaw Nation Division of Housing.	Wayne Scribner	901 N. Country Club Road.	Ada	OK	74820	937,040	1,802
39. Housing Authority of the Cherokee Nation of OK.	Hastings Shade	P.O. Box 948	Tahlequah	OK	74465–0948	1,607,840	3,092
40. Muscogee (Creek) Nation of Oklahoma.	Ann Hancock	P.O. Box 580	Okmulgee	OK	74447	560,277	1,846
41. Kaw Tribal Housing Authority.	Maryln Springer	P.O. Box 371, #9 Kanza Lane.	Newkirk	OK	74647	70,200	117
42. Warm Springs Housing Authority.	Chester VanPelt	P.O. Box 1167, 1238 Veteran Way.	Warm Springs	OR	97761	121,800	203
43. Rosebud Sioux Tribe	William Kindle	P.O. Box 430	Rosebud	SD	57570	653,400	1,161
44. Sisseton Wahpeton Housing Authority.	Ron Jones	P.O. Box 687	Sisseton	SD	57262	371,400	619
45. Cheyenne River Housing Authority.	Wayne Ducheneaux.	P.O. Box 480	Eagle Butte	SD	57625	540,600	901
46. Oglala Sioux Lakota Housing Authority.	Paul Iron Cloud	P.O. Box C	Pine Ridge	SD	57770	791,960	1,523
47. Yankton Sioux Tribal Housing Authority.	Joseph Abdo, Jr. ...	410 South Main Street.	Wagner	SD	57380	187,700	313
48. Lummi Indian Nation	Joseph Finkbonner	2616 Kwina Road ..	Bellingham	WA	98226	198,549	331
49. Quileute Housing Authority	Audrey Grafstrom ..	P.O. Box 159	La Push	WA	98350	39,000	65
50. Suquamish Tribe	Bennie Armstrong	P.O. Box 498	Suquamish	WA	98392	43,200	72
51. Spokane Indian Housing Authority.	Brook Kristovich	P.O. Box 195	Wellpinit	WA	99040	174,600	291
52. La Du Flambeau Chippewa Housing Authority.	Glory Allen	P.O. Box 187	La Du Flambeau ...	WI	54538	196,200	327
53. Ho Chunk Housing Authority.	Myra Price	P.O. Box 730	Tomah	WI	54660	106,800	178
54. Menominee Indian Tribe of Wisconsin.	Betty Wozniak	P.O. Box 910	Keshena	WI	54135	291,600	486
55. Stockbridge-Munsee Community.	Robert Chicks	P.O. Box 70	Bowler	WI	54416	57,600	96
56. Lac Courte Oreilles Housing Authority.	Lorene Wielgot	13416 W. Trepania Road.	Hayward	WI	54843	271,200	452
57. Northern Arapaho Tribal Housing.	Frank Armajo	P.O. Box 8236	Ethete	WY	82520	232,200	387

[FR Doc. 00–32218 Filed 12–18–00; 8:45 am]
BILLING CODE 4210–33–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Service Regulations Committee Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Fish and Wildlife Service (hereinafter Service) will conduct an open meeting on January 24, 2001, to identify and discuss preliminary issues concerning the 2001–02 migratory bird hunting regulations.

DATES: January 24, 2000.

ADDRESSES: The Service Regulations Committee will meet at the National Rural Electric Cooperative Association Building, 4301 Wilson Boulevard, Room CC2, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Jonathan Andrew, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634–ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714.

SUPPLEMENTARY INFORMATION: Representatives from the Service, the Service's Migratory Bird Regulations Committee, and Flyway Council Consultants will meet on January 24, 2001, at 8:30 a.m. to identify preliminary issues concerning the 2001–02 migratory bird hunting regulations for discussion and review by the Flyway Councils at their March meetings.

In accordance with Departmental policy regarding meetings of the Service Regulations Committee attended by any person outside the Department, these meetings are open to public observation. Members of the public may submit written comments on the matters discussed to the Director.

Dated: December 11, 2000.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 00–32302 Filed 12–18–00; 8:45 am]
BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Campo Band of Mission Indians Liquor Control Ordinance, Campo, CA

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Campo Band of Mission Indians Liquor Control Ordinance. The ordinance regulates the control of, the possession of, and the sale of liquor on the Campo Band of Mission Indians trust lands, and is in conformity with the laws of the State of California, where applicable and necessary. Although the ordinance was adopted on March 26, 2000, it does not become effective until published in the **Federal Register** because failure to comply with the ordinance may result in criminal charges.

DATES: This ordinance is effective on December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Kaye Armstrong, Office of Tribal Services, 1849 C Street, NW, MS–4631–MIB, Washington, DC 20240–4001; telephone (202) 208–4400.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transaction in Indian country. The Campo Band of Mission Indians Liquor Control Ordinance, Resolution No. 26–03–00–01, was duly adopted by the Campo General Council on March 26, 2000. The Campo Band of Mission Indians, in furtherance of its economic and social goals, has taken positive steps to regulate retail sales of alcohol and use revenues to combat alcohol abuse and its debilitating effects among individuals and family members within the Campo Band of Mission Indians.

This notice is being published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.

I certify that by Resolution No. 26–03–00–01, the Campo Band of Mission Indians Liquor Control Ordinance was duly adopted by the Campo Band General Council on March 26, 2000.

Dated: December 11, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs

The Campo Band of Mission Indians Liquor Control Ordinance, Resolution No. 26–03–00–01, reads as follows:

Campo Liquor Control Ordinance

Be It Enacted by the General Council of the Campo Indian Reservation, Campo Band of Mission Indians, sometimes referred to as the Campo Band of Mission Indians (hereinafter, ''Campo Band'') as follows:

Article 1: Name

This ordinance shall be known as the Campo Liquor Control Ordinance.

Article 2: Authority

This ordinance is enacted pursuant to the Act of August 15, 1953 (Pub. L. 83–277, 67 Stat. 588, 18 U.S.C. 1161) and Article IV of the Constitution and Bylaws of the Campo Band of Mission Indians.

Article 3: Purpose

The purpose of this ordinance is to regulate and control the possession and sale of liquor on the Campo Indian Reservation, and to permit alcohol sales by tribally owned and operated enterprises, and at tribally approved special events, for the purpose of the economic development of the Campo Band. The enactment of a tribal ordinance governing liquor possession and sales on the Campo Indian Reservation will increase the ability of tribal government to control Reservation liquor distribution and possession, and will provide an important source of revenue for the continued operation and strengthening of the tribal government, the economic viability of tribal enterprises, and the delivery of tribal government services. This Liquor Control Ordinance is in conformity with the laws of the State of California as required by 25 U.S.C. § 1161, and with all applicable federal laws.

Article 4: Effective Date

This ordinance shall be effective as of the date of its publication in the **Federal Register**.

Article 5: Possession of Alcohol

The introduction or possession of alcoholic beverages shall be lawful within the exterior boundaries of the Campo Indian Reservation; provided that such introduction or possession is in conformity with the laws of the State of California.

Article 6: Sales of Alcohol

(1) The sale of alcoholic beverages by business enterprises owned by and subject to the control of the Campo Band shall be lawful within the exterior boundaries of the Campo Indian Reservation; provided that such sales are in conformity with the laws of the State of California.

(2) The sale of alcoholic beverages by the drink at special events authorized by the Campo Band shall be lawful within the exterior boundaries of the Campo Indian Reservation; provided that such sales are in conformity with the laws of the State of California and with prior

approval by Resolution of the General Council of the Campo Band.

Article 7: Age Limits

The drinking age within the Campo Indian Reservation shall be the same as that of the State of California, which is currently 21 years. No person under the age of 21 years shall purchase, possess or consume any alcoholic beverage. At such time, if any, as California Business and Profession Code § 25658, which sets the drinking age for the State of California, is repealed or amended to raise or lower the drinking age within California, this Article shall automatically become null and void, and the Tribal Council shall be empowered to amend this Article to match the age limit imposed by state law.

Article 8: Civil Penalties

The Campo Band, through its Tribal Council and duly authorized security personnel, shall have the authority to enforce this ordinance by confiscating any liquor sold, possessed or introduced in violation hereof. The Tribal Council shall be empowered to sell such confiscated liquor for the benefit of the Campo Band, and to develop and approve such regulations as may become necessary for enforcement of this ordinance.

Article 9: Prior Inconsistent Enactments

Any prior tribal laws, resolutions or ordinances which are inconsistent with this ordinance are hereby repealed to the extent they are inconsistent with this ordinance. An ordinance legalizing the introduction, sale, or possession of intoxicants on the Campo Indian Reservation, California, was published in the **Federal Register** of February 6, 1968 (33 FR 2612).

Article 10: Sovereign Immunity

Nothing contained in this ordinance is intended to, nor does in any way, limit, alter, restrict, or waive the sovereign immunity of the Campo Development Corporation, from unconsented suit or action of any kind.

Article 11: Severability

If any provision of this ordinance is found by any agency or court of competent jurisdiction to be unenforceable, the remaining provisions shall be unaffected thereby.

Article 12: Amendment

This ordinance may be amended by majority vote of the General Council of the Campo Band at a duly noticed General Council meeting.

[FR Doc. 00–32317 Filed 12–18–00; 8:45 am]
BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Liquor Ordinance of the Jamul Indian Village, Jamul, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Jamul Indian Village's Liquor Ordinance. The Ordinance regulates the control of, the possession of, and the sale of liquor on the Jamul Indian Village's trust lands, and is in conformity with the laws of the State of California, where applicable and necessary. Although the Ordinance was adopted on July 20, 1996, it does not become effective until published in the **Federal Register** because the failure to comply with the ordinance may result in criminal charges.

DATES: This Ordinance is effective on December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Kaye Armstrong, Office of Tribal Services, 1849 C Street, NW, MS 4631–MIB, Washington, D.C. 20240–4001; telephone (202) 208–4400.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in Rice v. Rehner, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transaction in Indian country. The Jamul Indian Village's Liquor Ordinance, Resolution No. 96–16, was duly adopted by the Jamul Indian Village General Council on July 20, 1996. The Jamul Indian Village, in furtherance of its economic and social goals, has taken positive steps to regulate retail sales of alcohol and use revenues to combat alcohol abuse and its debilitating effects among individuals and family members within the Jamul Indian Village.

This notice is being published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.

I certify that by Resolution No. 96–16, the Jamul Indian Village's Liquor Ordinance was duly adopted by the Jamul Indian Village General Council on July 20, 1996.

Dated: December 11, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

The Jamul Indian Village's Liquor Ordinance, Resolution No. 96–16, reads as follows:

Liquor Ordinance of The Jamul Indian Village

Chapter I—Introduction

101. *Title.* This ordinance shall be known as the ''Liquor Ordinance of the Jamul Indian Village.''

102. *Authority.* This ordinance is enacted pursuant to the Act of August 15, 1953, (Public Law 83–277, 67 Stat. 588, 18 U.S.C. 1161) and Article VIII of the Constitution of the Jamul Indian Village.

103. *Purpose.* The purpose of this ordinance is to regulate and control the possession and sale of liquor on the Jamul Reservation. The enactment of a tribal ordinance governing liquor possession and sale on the reservation will increase the ability of the tribal government to control reservation liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal government services.

Chapter II—Definitions

201. As used in this ordinance, the following words shall have the following meanings unless the context clearly requires otherwise.

202. *Alcohol* means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine which is commonly produced by the fermentation or distillation of grain, starch, molasses, or sugar, or other substances including all dilutions of this substance.

203. *Alcoholic Beverage* is synonymous with the term ''Liquor'' as defined in section 208 of this chapter.

204. *Bar* means any establishment with special space and accommodations for sale by the glass and for consumption on the premises of beer, as herein defined.

205. *Beer* means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain of cereal in pure water containing not more than 4 percent of alcohol by volume. For the purposes of this title, any such beverage, including ale, stout, and porter, containing more than 4

percent of alcohol by weight shall be referred to as ''strong beer.''

206. *Committee* means the Business Committee of the Jamul Indian Village.

207. *General Council* means the general council of the Jamul Indian Village which is composed of the voting membership of the Tribe as a whole.

208. *Liquor* includes the four varieties of liquor herein defined (alcohol, spirits, wine and beer), and all fermented spirituous, vinous, or malt liquor or combination thereof, and mixed liquor, or otherwise intoxicating; and every liquid or solid or semisolid or other substance, patented or not, containing alcohol, spirits, wine or beer, and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption and any liquid, semisolid, solid, or other substances, which contain more than 1 percent of alcohol by weight shall be conclusively deemed to be intoxicating.

209. *Liquor Store* means any store at which liquor is sold and, for the purposes of this ordinance, including stores only a portion of which are devoted to sale of liquor or beer.

210. *Malt Liquor* means beer, strong beer, ale stout, and porter.

211. *Package* means any container or receptacle used for holding liquor.

212. *Public Place* includes state or county or tribal or federal highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; soft drink establishments; public buildings, public meeting halls, lobbies, halls and dining rooms of hotels, restaurants, theaters, gaming facilities, entertainment centers, store garages, and filling stations which are open to and/or are generally used by the public and to which the public is permitted to have unrestricted access; public conveyances of all kinds and character; and all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the public. For the purposes of this ordinance, ''Public Place'' shall also include any establishment other than a single family home which is designed for or may be used by more than just the owner of the establishment.

213. *Reservation* means land held in trust by the United States Government for the benefit of the Jamul Indian Village (see also Tribal Land).

214. *Sale* and *Sell* include exchange, barter, and traffic; and also include the selling or supplying or distributing by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatsoever commonly used to describe malt or brewed liquor or wine by any person to any person.

215. *Spirits* mean any beverage, which contains alcohol obtained by distillation, including wines exceeding 17 percent of alcohol by weight.

216. *Tribe* means the Jamul Indian Village.

217. *Tribal Land* means any land within the exterior boundaries of the Reservation which is held in trust by the United States for the Tribe as a whole, including such land leased to other parties.

218. *Trust Account* means the account designated by the tribal treasurer for deposit of proceeds from the tax on the sale of alcoholic beverages.

219. *Trust Agent* means the tribal Chairperson or a designee of the Chairperson.

220. *Wine* means any alcoholic beverage obtained by fermentation of fruits (grapes, berries, apples, etc.) or other agricultural product containing sugar, to which any saccharine substances may have been added before, during or after fermentation, and containing not more than 17 percent of alcohol by weight, including sweet wines fortified with wine spirits such as port, sherry, muscatel, and angelica, not exceeding 17 percent of alcohol by weight.

Chapter III—Powers of Enforcement

301. *Powers.* The Committee, in furtherance of the ordinance, shall have the following powers and duties:

(a) To publish and enforce the rules and regulations governing the sale, manufacture, and distribution of alcoholic beverages on the Reservation;

(b) To employ managers, accountants, security personnel, inspectors, and such other persons as shall be reasonably necessary to allow the Committee to perform its functions. Such employees shall be tribal employees;

(c) To issue licenses permitting the sale or manufacture or distribution of liquor on the Reservation;

(d) To hold hearing on violations of this ordinance or for the issuance or revocation of licenses hereunder;

(e) To bring suit in the appropriate court to enforce this ordinance as necessary;

(f) To determine and seek damages for violation of this ordinance;

(g) To make such reports as may be required by the General Council;

(h) To collect taxes and fees levied or set by the Committee, and to keep accurate records, books and accounts; and

(i) To exercise such other powers as delegated by the General Council.

302. *Limitation on Powers.* In the exercise of its powers and duties under this ordinance, the Committee and its individual members shall not accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer, or distributor or from any licensee.

303. *Inspection Rights.* The premises on which liquor is sold or distributed shall be open for inspection by the Committee at all reasonable time for the purposes of ascertaining whether the rules and regulations of this ordinance are being complied with.

Chapter IV—Sales of Liquor

401. *Licenses Required.* No sales of alcoholic beverages shall be made within the exterior boundaries of the Reservation, except at a tribally-licensed or tribally-owned business operated on tribal land within the exterior boundaries of the Reservation.

402. *Sales Only on Tribal Land.* All liquor sales within the exterior boundaries of the Reservation shall be on Tribal Land, including leases thereon.

403. *Sales for Cash.* All liquor sales within the Reservation boundaries shall be on a cash only basis and no credit shall be extended to any person, organization, or entity, except that this provision does not prevent the use of major credit cards.

404. *Sale for Personal Consumption.* All sales shall be for the personal use and consumption of the purchaser. The resale of any alcoholic beverage purchased within the exterior boundaries of the Reservation is prohibited. Any person who is not licensed pursuant to this ordinance who purchases an alcoholic beverage within the boundaries of the Reservation and sells it, whether in the original container or not, shall be guilty of a violation of this ordinance and shall be subjected to paying damages to the Tribe as set forth herein.

Chapter V—Licensing

501. *Application for Tribal Liquor License—Requirements.* No tribal license shall be issued under this ordinance except upon a sworn application filed with the Committee containing a full and complete showing of the following:

(a) Satisfactory proof that the applicant is or will be duly licensed by the State of California.

(b) Satisfactory proof that the applicant is of good character and reputation among the people of the Reservation and that the applicant is financially responsible.

(c) The description of the premises in which the intoxicating beverages are to be sold, proof that the applicant is the owner of such premises, or lessee of

such premises, for at least the term of the license.

(d) Agreement by the applicant to accept and abide by all conditions of the tribal license.

(e) Payment of a $100.00 fee as prescribed by the Committee.

(f) Satisfactory proof that neither the applicant nor the applicant's spouse has ever been convicted of a felony.

(g) Satisfactory proof that notice of the application has been posted in a prominent, noticeable place on the premises where intoxicating beverages are to be sold for at least 30 days prior to consideration by the Committee and has been published at least twice in such local newspaper serving the community that may be affected by the license. The notice shall state the date, time, and place when the application shall be considered by the Committee pursuant to section 502 of this ordinance.

502. *Hearing on Application for Tribal Liquor License.* All applications for a tribal liquor license shall be considered by the Committee in open session at which the applicant, his/her attorney, and any person protesting the application shall have the right to be present, and to offer sworn oral or documentary evidence relevant to the application. After the hearing, the Committee, by secret ballot, shall determine whether to grant or deny the application based on:

(a) Whether the requirements of section 501 have been met;

(b) Whether the Committee, in its discretion, determines that granting the license is in the best interest of the Tribe, and

(c) In the event that the applicant is a member of the General Council, or a member of the immediate family of a General Council member, such member shall not vote on the application or participate in the hearings as a Committee member.

503. *Temporary Permits.* The Committee or their designee may grant a temporary permit for the sale of intoxicating beverages for a period not to exceed 3 days to any person applying for the same in connection with a tribal or community activity, provided that the conditions prescribed in section 504 of this ordinance shall be observed by the permittee. Each permit issued shall specify the types of intoxicating beverages to be sold. Further, a fee of $25.00 will be assessed on temporary permits.

504. *Conditions of the Tribal License.* Any tribal license issued under this title shall be subject to such reasonable conditions as the Committee shall fix, including, but not limited to the following:

(a) The license shall be for a term not to exceed 2 years.

(b) The license shall at all times maintain an orderly, clean, and neat establishment, both inside and outside the licensed premises.

(c) The licensed premises shall be subject to patrol by the tribal police department, and such other law enforcement officials as may be authorized under federal, California, or tribal law.

(d) The licensed premises shall be open to inspection by duly authorized tribal officials at all times during the regular business hours.

(e) Subject to the provisions of subsection (g) of this section, no intoxicating beverages shall be sold, served, disposed of, delivered, or given to any person, or consumed on the licensed premises except in conformity with the hours and days prescribed by the laws of the State of California, and in accordance with the hours fixed by the Committee, provided that the licensed premises shall not operate or open earlier or operate or close later than is permitted by the laws of the State of California.

(f) No liquor shall be sold within 200 feet of a polling place on tribal election days, or when a referendum is held by the people of the tribe, and including special days of observation as designated by the Committee.

(g) All acts and transactions under authority of the tribal liquor license shall be in conformity with the laws of the State of California, and shall be in accordance with this ordinance and any tribal license issued pursuant to this ordinance.

(h) No person under the age permitted under the laws of the State of California shall be sold, served, delivered, given, or allowed to consume alcoholic beverages in the licensed establishment and/or area.

(i) There shall be no discrimination in the operations under the tribal license by reason of race, color, or creed.

505. *License Not a Property Right.* Notwithstanding any other provision of this ordinance, a tribal liquor license is a mere permit of a fixed duration of time. A tribal liquor license shall not be deemed a property right or vested right of any kind, nor shall the granting of a tribal liquor license give rise to a presumption of legal entitlement to the granting of such license for a subsequent time period.

506. *Assignment or Transfer.* No tribal license issued under this ordinance shall be assigned or transferred without the written approval of the Committee expressed by formal resolution.

Chapter VI—Rules, Regulations, and Enforcement

601. *Sales or Possession With Intent to Sell Without a Permit.* Any person who shall sell or offer for sale or distribute or transport in any manner, any liquor in violation of this ordinance, or who shall operate or shall have liquor in his/her possession with intent to sell or distribute without a permit, shall be guilty of a violation of this ordinance.

602. *Purchases From Other Than Licensed Facilities.* Any person within the boundaries of the Reservation who buys liquor from any person other than at a properly licensed facility shall be guilty of a violation of this ordinance.

603. *Sales to Persons Under the Influence of Liquor.* Any person who sells liquor to a person apparently under the influence of liquor shall be guilty of a violation of this ordinance.

604. *Consuming Liquor in Public Conveyance.* Any person engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant or employee of such person who shall knowingly permit any person to drink any liquor in any public conveyance shall be guilty of an offense. Any person who shall drink any liquor in a public conveyance shall be guilty of a violation of this ordinance.

605. *Consumption or Possession of Liquor by Persons Under 21 Years of Age.* No person under the age of 21 years shall consume, acquire or have in his/her possession any alcoholic beverage. No person shall permit any other person under the age of 21 to consume liquor on his/her premises or any premises under his/her control except in those situations set out in this section. Any person violating this section shall be guilty of a separate violation of this ordinance for each and every drink so consumed.

606. *Sales of Liquor to Persons Under 21 Years of Age.* Any person who shall sell or provide liquor to any person under the age of 21 years shall be guilty of a violation of this ordinance for each sale or drink provided.

607. *Transfer of Identification to Minor.* Any person who transfers in any manner an identification of age to a minor for the purpose of permitting such minor to obtain liquor shall be guilty of an offense; provided, that corroborative testimony of a witness other than the minor shall be a requirement of finding a violation of this ordinance.

608. *Use of False or Altered Identification.* Any person who attempts to purchase an alcoholic beverage

through the use of false or altered identification which falsely purports to show the individual to be over the age of 21 years shall be guilty of violating this ordinance.

609. *Violations of This Ordinance.* Any person guilty of a violation of this ordinance shall be liable to pay the Tribe a penalty not to exceed $500 per violation as civil damages to defray the Tribe's cost of enforcement of this ordinance. In addition to any penalties so imposed, any license issued hereunder may be suspended or canceled by the Committee for the violation of any of the provisions of this ordinance, or of the tribal license, upon hearing before the Committee after 10 days notice to the licensee. The decision of the Committee shall be final.

610. *Acceptable Identification.* Where there may be a question of a person's right to purchase liquor by reason of his/her age, such person shall be required to present any one of the following issued cards of identification which shows his/her correct age and bears his/her signature and photograph:

(a) Driver's license of any state or identification card issued by any State Department of Motor Vehicles;

(b) United States Active Duty Military identification; or

(c) Passport.

611. *Possession of Liquor Contrary to This Ordinance.* Alcoholic beverages which are possessed contrary to the terms of this ordinance are declared to be contraband. Any tribal agent, employee, or officer who is authorized by the Committee to enforce this section shall have the authority to, and shall seize, all contraband.

612. *Disposition of Seized Contraband.* Any officer seizing contraband shall preserve the contraband in accordance with applicable law. Upon being found in violation of the ordinance by the Committee, the party shall forfeit all right, title and interest in the items seized which shall become the property of the Tribe.

Chapter VII—Taxes

701. *Sales Tax.* There is hereby levied and shall be collected a tax on each sale of alcoholic beverages on the Reservation in the amount of 1 percent of the amount actually collected, including payments by major credit cards. The tax imposed by this section shall apply to all retail sales of liquor on the Reservation and shall preempt any tax imposed on such liquor sales by the State of California.

702. *Payment of Taxes to Tribe.* All taxes from the sale of alcoholic beverages on the Reservation shall be paid over to the agent of the Tribe.

703. *Taxes Due.* All taxes for the sale of alcoholic beverages on the Reservation are due within 30 days of the end of the calendar quarter for which the taxes are due.

704. *Reports.* Along with payment of the taxes imposed herein, the taxpayers shall submit an accounting for the quarter of all income from the sale or distribution of said beverages as well as for the taxes collected.

705. *Audit.* As a condition of obtaining a license, the licensee must agree to the review or audit of its books and records relating to the sale of alcoholic beverages on the Reservation. Said review or audit may be done annually by the Tribe through its agents or employees whenever, in the opinion of the Committee, such a review or audit is necessary to verify the accuracy of reports.

Chapter VIII—Profits

801. *Disposition of Proceeds.* The gross proceeds collected by the Committee from all licensing provided from the taxation of the sales of alcoholic beverages on the Reservation shall be distributed as follows:

(a) For the payment of all necessary personnel, administrative costs, and legal fees for the operation and its activities; and

(b) The remainder shall be turned over to the account of the Tribe.

Chapter IX—Severability and Miscellaneous

901. *Severability.* If any provision or application of this ordinance is determined by review to be invalid, such adjudication shall not be held to render ineffectual the remaining portions of this title or to render such provisions inapplicable to other persons or circumstances.

902. *Prior Enactments.* All prior enactments of the Committee which are inconsistent with the provisions of this ordinance are hereby rescinded.

903. *Conformance with California Laws.* All acts and transactions under this ordinance shall be in conformity with the laws of the State of California as that term is used in 18 U.S.C. 1161.

904. *Effective Date.* This ordinance shall be effective on such date as the Secretary of the Interior certifies this ordinance and publishes the same in the **Federal Register**.

Chapter X—Adoption and Amendment

1001. This ordinance shall be adopted and may be amended by a majority vote of the General Council at a duly called meeting of the General Council.

Chapter XI—Sovereign Immunity

1101. Nothing contained in this ordinance is intended to, nor does in any way limit, alter, restrict, or waive the Tribe's sovereign immunity from unconsented suit or action.

[FR Doc. 00–32318 Filed 12–18–00; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–220–1020–PB–01–24 1A]

Extension of Approved Information Collection, OMB Approval Number 1004–0051

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) announces its intention to request extension of an existing approval to collect certain information from permittees and lessees on the actual grazing use by their livestock. BLM uses Form 4130–5 (ACTUAL GRAZING USE REPORT) under the authority of Sections 3 and 15 of the Taylor Grazing Act and implementing regulations found at 43 CFR 4130.3–2(d) and 4130.8–1(e). BLM request information necessary to compute the amount of forage consumed by the authorized grazing animals by area and period.

DATES: You must submit your comments to BLM at the appropriate address below on or before February 20, 2001. BLM will not necessarily consider any comments received after the above date.

ADDRESSES: Comments may be mailed to: Regulatory Affairs Group (630), Bureau of Land Management, 1849 C Street NW., Room 401LS, Washington, DC 20240.

Comments may be sent via Internet to: *WOComment@blm.gov.* Please include ''ATTN: 1004–0051'' and your name and return address in your Internet message.

Comments may be hand-delivered to the Bureau of Land Management, Administrative Record, Room 401, 1620 L Street, NW., Washington, DC.

Comments will be available for public review at the L Street address during regular business hours (7:45 a.m. to 4:15 p.m), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: You may contact Ken Visser on (202) 452–7743 (commercial or FTS). Persons who use a telecommunications device for the

deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8330, 24 hours a day, seven days a week, to contact Mr. Visser.

SUPPLEMENTARY INFORMATION: 5 CFR 1320.12(a) requires BLM to provide 60-day notice in the **Federal Register** concerning a collection of information contained in regulations in 43 CFR Part 4130 to solicit comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. BLM will receive and analyze any comments sent in response to this notice and include them with its request for approval from the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The Taylor Grazing Act (TGA) of 1934 (43 U.S.C. 315, 315 *et seq.*,) the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1701 *et seq.*), and the Public Rangelands Improvement Act (PRIA) of 1978 (43 U.S.C. 1901 *et seq.*) provide the authority for the BLM to administer the livestock grazing program consistent with land-use plans, multiple-use objectives, sustained yield, environmental values, economic considerations, and other factors. BLM administers the grazing program generally by issuing grazing permits or leases that specify allowable livestock use by location, number and period. BLM recognizes that to sustain and conserve resources, minor annual adjustments of grazing terms and conditions as specified on a multi-year term permit or lease are needed to balance actual grazing use with available forage and water. Therefore, rather than relying solely upon the terms and conditions of the permit or leases as a record of the use made during any one year, BLM can require submission of information that more accurately reflects the grazing use. Sections 3 and 15 of the TGA and regulations in 43 CFR 4130.3–2(d) provide that BLM may require permittees or lessees to furnish a record of their actual grazing use. The regulations at 43 CFR 4130.8–1(e) provide for a grazing fee payment after the grazing season under specified circumstances.

BLM uses this information for two specific purposes:

a. To *calculate the fees due for the grazing use completed.* Fees are due the United States upon issuance of a billing notice and must be paid in full prior to grazing use, except when an allotment management plan (AMP) provides for delayed payment and has been incorporated into a grazing permit or lease. In this latter situation, BLM will issue a billing notice based upon the actual grazing use completed at the end of the grazing period or year (43 CFR 4130.8–1(e)). BLM uses the information collected to bill for grazing use or to makeup a part of the allotment monitoring records. The permittee and lessee must keep accurate and current records for the period of time covered by his/her permit or lease. The information collected includes allotment and pasture location of the grazing, the date and numbers of livestock permitted on or removed from the range, and the kind or class of livestock grazed.

b. To *obtain information needed to monitor and evaluate livestock grazing use.* The purposes of the information are to determine if adjustments in the amount of use are needed, or if other management actions could achieve the desired effects. Knowledge of actual livestock grazing use is essential in the monitoring and the evaluation of the livestock grazing management program. Information on the specific use is essential for an accurate and complete analysis and evaluation of the effects of livestock grazing during particular periods of time, as interrelated with other factors such as climate, growth characteristics of the vegetation, and utilization levels on the plants. Failure to collect this information would result in BLM having unsatisfactory data and a reduced capability to make adjustments in grazing use or management.

Without this information, the BLM could not fulfill its responsibility to manage uses of the public land as required by law. The required information is only available form the grazing operators. Because the actual grazing use that occurs is not constant from year to year, BLM requires information for each grazing season for which grazing use is sought.

Based on BLM's experience administering the activities described above, the public reporting burden for the information collected estimates to average 25 minutes per response. Because of the variations in size and complexity of range livestock operations, some of the 15,000 responses may take a few minutes in one recording session to complete the form, while others may take up to 60 minutes combined through several sessions during the grazing year, with each requiring a few minutes to enter the required data. The respondents include permittees and lessees required to furnish a record of the actual grazing use. The frequency of response is annually. The estimated number of responses per year is 15,000. The estimated total annual burden is 6,250 hours. BLM specifically requests your comments on its estimate of the amount of time that it takes to prepare a response.

BLM will summarize all responses to this notice and include them in the request for Office of Management and Budget approval. All comments will also become a matter of public record.

Dated: December 14, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–32292 Filed 12–18–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[(CA–610–5101–ER–G032) CACA–40467]

Proposed Right-of-Way for an AT&T Corp. Buried Fiber Optic Telecommunications System and Plan Amendment

AGENCY: California Desert District, Bureau of Land Management.

ACTION: Notice of availability of an Environmental Assessment for a fiber optic telecommunications system from Lemesa, Texas to Los Angeles, California.

SUMMARY: In accordance with section 202 of the National Environmental Policy Act of 1969, the Department of Interior, Bureau of Land Management (California Desert District), as lead agency, along with the U.S. Forest Service (Cleveland National Forest) and U.S. Marine Corps (Camp Pendleton) as cooperating agencies, have prepared an Environmental Assessment for a right-of-way proposed by AT&T Corp. for a buried fiber optic telecommunications line and associated facilities. This system, running from Lamesa, Texas to Los Angeles, California, is called the AT&T NexGen/Core Fiber Optic Telecommunications Project (''Project'').

The proposed action, which crosses federal lands in the States of California, Arizona and New Mexico, includes an amendment to the California Desert Conservation Area (CDCA) Plan which, if approved, will allow an exception to construct portions of this project along existing highways instead of within designated utility corridors on federal lands in Riverside, Imperial and San Diego Counties, California.

The proposed Project would consist of five links or points-of-presence (POP) connecting: (1) Lamesa to El Paso, Texas; (2) El Paso to Tucson, Arizona; (3) Tucson to Blythe, California; (4) Blythe to San Diego, California; and (5) San Diego to Los Angeles, California. The purpose being to construct, operate and maintain a buried fiber optic telecommunications system, including signal regeneration or optical amplification stations located every 40–50 miles, between Texas and California.

Copies are available for public review at Bureau of Land Management offices in: Las Cruces, New Mexico; Safford, Tucson, Phoenix and Yuma, Arizona; and Palm Springs, El Centro, and Riverside, California. In addition copies will be available at the Environmental Office of Camp Pendleton as well as the Descanso Ranger District of the Cleveland National Forest. Furthermore, public reading copies may be downloaded from the following website: *http://www.ca.blm.gov/cdd/att_nexgen_ea.html.*

DATES: Written comments on this document must be submitted or postmarked no later than February 20, 2001.

ADDRESSES: Written comments on this document should be addressed to: Stephen Johnson, Special Projects Manager, BLM California Desert District, 6221 Box Springs Blvd., Riverside, CA 92507.

FOR FURTHER INFORMATION CONTACT: Stephen Johnson, Special Projects Manager, at the above address or by phone at (909) 697–5233.

SUPPLEMENTARY INFORMATION: The project configuration, as proposed and including measures to avoid, minimize, or mitigate impacts on the environment, is being considered along with a ''No Project'' and ''Utility Corridor'' alternative. The BLM has been asked to issue rights-of-way for portions of this fiber optic system that cross public lands.

The California portion of this Project, which as proposed includes an exception to the CDCA Plan to construction portions along existing roads instead of within designated utility corridors, begins at the Point of Presence (POP) in Blythe, California, and would travel in a southwesterly direction along Highway 78 and Old Highway 80 through the following city jurisdictions: Blythe, Brawley, El Centro, El Cajon, La Mesa, and San Diego. From San Diego north to Los Angeles the route would primarily parallel the coast traversing the U.S. Marine Corps Camp Pendleton. In addition, the route would pass through large portions of unincorporated areas in Riverside, Imperial and San Diego Counties, and besides public lands administered by the BLM, it would also cross the Descanso Ranger District of Cleveland National Forest, the USMC's Camp Pendleton, as well as the La Posta and Campo Indian Reservations. It would require an urban build through San Diego and Los Angeles, terminating at the POP in Los Angeles, California.

The fiber optic telecommunications system project entails the design and construction of a six-duct conduit system and ancillary facilities to accommodate digital broadband Internet Protocol. Ancillary facilities would include: regeneration stations and Optical Amplification (Op Amp) Stations spaced an average of 50 miles; buried splice boxes placed at 2,500-foot intervals; and marker poles placed 500 feet apart. The Project, as described in the EA, should contribute small to no additional impact to the environment and would operate entirely within previously disturbed and routinely maintained road rights-of-way.

Dated: December 12, 2000.

Alan Stein,

Acting District Manager.

[FR Doc. 00–32205 Filed 12–18–00; 8:45 am]

BILLING CODE 4310–40–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–020–1610–DH CBMP]

Notice of Intent To Amend the Powder River and Billings Resource Management Plans (RMPs) and Conduct Scoping Meetings, Montana

AGENCY: Bureau of Land Management, Miles City and Billings Field Offices, Interior.

ACTION: Notice.

SUMMARY: BLM will prepare an Oil and Gas Resource Management Plan (RMP) Amendment and Environmental Impact Statement (EIS) jointly with the State of Montana (State). The planning area for the BLM will be the BLM-administered oil and gas estate within the Powder River and Billings RMP areas. The planning area for the State will be potential coal bed methane development areas around the state. The RMP Amendment will be based on the existing statutory requirements and will meet the requirements of the Federal Land Policy and Management Act (FLPMA) of 1976. The RMP Amendment will guide BLM's oil and gas decisions within the Powder River and Billings RMP areas and help the State evaluate effects of further oil and gas permit applications. The Draft EIS and RMP Amendment is scheduled for completion by September 2001. The Final EIS and Proposed RMP Amendment is scheduled for March 2002.

The public is asked to help BLM and the State identify issues, concerns and alternatives. Draft Planning Criteria to help guide the effort have also been developed for public comment.

DATES: Any issues, concerns, or alternatives should be submitted to BLM on or before January 17, 2001. Public scoping meetings are scheduled as follows:

1. January 4, 2001, 7:00 p.m. to 9:00 p.m., Billings, Montana
2. January 9, 2001, 2:00 p.m. to 4:00 p.m., Broadus, Montana
3. January 9, 2001, 7:00 p.m. to 9:00 p.m., Ashland, Montana
4. January 10, 2001, 7:00 p.m. to 9:00 p.m., Miles City, Montana
5. January 11, 2001, 7:00 p.m. to 9:00 p.m., Helena, Montana

ADDRESSES: All submissions should be sent to the following address: BLM, Mary Bloom, BLM Project Leader, 111 Garryowen Road, Miles City, Montana, 59301.

The public scoping meetings will be held at the following locations:

1. Billings—Lewis and Clark Room in the Student Union Building of the Montana State University-Billings
2. Broadus—Community Center at the Powder River County Fairgrounds
3. Ashland—Multi-purpose Room of the Ashland Public Elementary School on Highway 212
4. Miles City—Room 106 of Miles Community College
5. Helena—Director's Conference Room #111, Metcalf Building, 1520 East Sixth Avenue

FOR FURTHER INFORMATION CONTACT: Mary Bloom, BLM Project Leader, (406) 233–3649.

SUPPLEMENTARY INFORMATION: The BLM and the State of Montana are co-leads for the effort. The BLM's planning area is BLM-administered oil and gas in the

Powder River and Billings RMP areas. The Powder River RMP area consists of Treasure, Rosebud, Powder River, Carter, and portions of Custer and Big Horn counties. The Billings RMP area consists of Wheatland, Golden Valley, Musselshell, Sweet Grass, Stillwater, Yellowstone, Carbon, and a portion of Big Horn counties. The State of Montana will evaluate the effects of further permit applications in BLM's planning area and other areas around the state including portions of Blaine, Park and Gallatin counties. BLM and the state have drafted a Memorandum of Understanding to conduct a joint EIS. The joint EIS will analyze impacts to resources as a result of oil and gas, including coal bed methane, development.

The Powder River and Billings RMPs, as amended by BLM's 1994 ''Oil and Gas Amendment of the Billings, Powder River and South Dakota RMPs'' support limited conventional oil and gas development and coal bed methane exploration and production. Numerous conventional oil and gas wells are located on state and federal minerals in the planning area. An October 18, 2000 meeting of the Coal Bed Methane Coordination Group indicates that industry projects drilling approximately 10,000 coal bed methane wells in the Montana portion of the Powder River Basin over the next 10 years, in addition to an unspecified number of conventional oil and gas wells. In order to analyze an increased interest in oil and gas activity, an EIS and RMP amendment is being prepared.

The public is asked to assist the BLM and the State with identification of issues related to oil and gas development, including coal bed methane. Examples of potential issues (problems, concerns) are: Water (surface and ground), socioeconomics, soils, water, Air, vegetation and wildlife.

Alternatives will be developed to present a range of feasible management actions. The ''No Action Alternative'' will be included in accordance with 40 CFR 1502.14(d) and represent the continuation of current management.

Development of this RMP Amendment will require involvement of professionals from these disciplines: Air quality, cultural resources, economics, hazardous materials, hydrology, lands, realty, minerals, geology, paleontology, recreation, sociology, soils, vegetation, and wildlife.

Planning criteria help guide the development of the Amendment and EIS by focusing efforts where they are needed, providing direction for the plan, and identifying legal, policy, or regulatory constraints that direct or limit BLM's ability to resolve issues. After taking into consideration the public's comments on the criteria, they will be finalized to help guide the plan.

The public will be provided the opportunity to review and comment on issues identified by BLM and the State, identify new issues, and comment on the Draft Planning Criteria. A mailing list is being developed and will be used to communicate with and solicit comments from local, state and federal agencies, Native American tribes, the Eastern Montana Resource Advisory Council, and the public at large that may be affected by the plan. As the planning process proceeds, these publics will be encouraged to participate.

Public information will be available at scoping meetings to be held at Broadus, Miles City, Ashland, Billings and Helena, Montana from January 4 through January 11, 2001. See **DATES** and **ADDRESSES** sections for specific meeting information.

The BLM and the State are seeking information from individuals, organizations, and agencies that may be affected by the plan. Specifically, we request any issues, concerns or alternatives that should be addressed in the plan amendment.

This notice meets the requirements of 40 CFR 1501.7 and 43 CFR 1610.2(c).

Dated: December 5, 2000.

Fred O'Ferrall,

Assistant Field Manager.

[FR Doc. 00–31447 Filed 12–18–00; 8:45 am]

BILLING CODE 4310–$$–U

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

(MTM 90527; IDI 33690)

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Montana and Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service, has filed an application to withdraw 2,548.42 acres of National Forest System land to preserve the unique resources of Lemhi Pass National Historic Landmark. This notice closes the land for up to 2 years from location and entry under the United States mining laws. The land will remain open to all activities currently consistent with applicable Forest plans and those related to exercise of valid existing rights.

DATES: Comments and requests for a public meeting must be received by March 19, 2001.

ADDRESSES: Comments and meeting requests should be sent to the Forest Supervisor, Beaverhead-Deerlodge National Forest, 420 Barrett Street, Dillon, Montana 59725–3572.

FOR FURTHER INFORMATION CONTACT: Katie Bump, Project Coordinator, Beaverhead-Deerlodge National Forest, 420 Barrett Street, Dillon, Montana 59725–3572.

SUPPLEMENTARY INFORMATION: On November 28, 2000, the Forest Service filed an application to withdraw the following-described National Forest System land from location and entry under the United States mining laws, but not the mineral leasing laws, subject to valid existing rights:

Principal Meridian, Montana

Beaverhead-Deerlodge National Forest (462.16 acres)

T. 10 S., R. 15 W.,
Sec. 9, lots 1 to 4, inclusive, and E½E½;
Sec. 16, lots 1 and 2, and E½NE¼.

Boise Meridian

Salmon-Challis National Forest (1,043.13 acres)

T. 19 N., R. 25 E.,
Sec. 10, S½SE¼;
Sec. 11, lot 4, S½SW¼, and SW¼SE¼;
Sec. 14, lots 1 to 5, inclusive, lots 7 and 8, NW¼, and W½E½;
Sec. 15, NE¼ and N½SE¼.

The area described contains approximately 2,548.42 acres in Beaverhead County, Montana, and Lemhi County, Idaho.

In addition, any non-federal lands within the boundary described above, if acquired by the United States, would become subject to the terms and conditions of this withdrawal.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Forest Supervisor, Beaverhead-Deerlodge National Forest, at the address indicated above.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the Forest Supervisor at the address indicated above within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting

will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary land uses which may be permitted during this segregative period include all activities currently consistent with applicable Forest plans and those related to exercise of valid existing rights, including public recreation and other activities compatible with preservation of Lemhi Pass National Historic Landmark and the Lewis and Clark National Historic Trail.

Dated: December 7, 2000

Howard A. Lemm,

Chief, Branch of Land Resources, Division of Resources.

[FR Doc. 00–32293 Filed 12–18–00; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 9, 2000. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, 1849 C St., NW, NC400, Washington, DC 20240. Written comments should be submitted by January 3, 2001.

Carol D. Shull,

Keeper of the National Register.

CALIFORNIA

Los Angeles County

Venice of America House, 1223 Cabrillo Ave., Los Angeles, 00001623

San Francisco County

Haas Candy Factory, 54 Mint St., San Francisco, 00001622

COLORADO

Routt County

First National Bank Building, 803–807 Lincoln Ave., and 57½ 8th St., Steamboat Springs, 00001624

CONNECTICUT

Hartford County

South End Historic District, Roughly bounded East Rd., Willis St., George St., and South St., Bristol, 00001625

IDAHO

Franklin County

Relic Hall, 111 E. Main St., Franklin, 00001627

Minidoka County

Rupert Town Square Historic District, Roughly bounded by 7th St., E St., 5th St. and F St., Rupert, 00001626

ILLINOIS

Cook County

Graceland Cemetery, 4001 N. Clark St., Chicago, 00001628

INDIANA

Marshall County

Hemminger Travel Lodge, 800 Lincolnway East, Plymouth, 00001629

LOUISIANA

Caddo Parish

Fair Park High School, 3222 Greenwood Rd., Shreveport, 00001630

MAINE

Aroostook County

Anderson Bros. Store, 280 Main St., Stockholm, 00001635

Kennebec County

Colburn School, Arnold Rd., 0.4 mi. S of jct. with ME 27, Pittston, 00001633

Lincoln County

Main Street Historic District (Boundary Increase), 170–270 Main St., 4–5 Bristol Rd., Damariscotta, 00001636

Oxford County

Andover Hook and Ladder Company Building, 39 Elm St., Andover, 00001631

Greenwood Town Hall, Former, 270 Main St., Locke Mills, 00001634

Sagadahoc County

Cathance Water Tower, Cathance Rd. jct. with Beechwood Dr., Topsham, 00001637

Washington County

Gallison Memorial Library, US 1, 0.5 mi. W of jct. with US 1A, Harrington, 00001632

MICHIGAN

Oceana County

Navigation Structures at Pentwater Harbor, West End of Lowell St., Pentwater, 00001638

NEVADA

Douglas County

Jobs Peak Ranch, 144 Summit Ridge Way, Genoa, 00001639

NORTH CAROLINA

Guilford County

Adams, John H., House, 1108 N. Main St., High Point, 00001641

Mecklenburg County

Union Storage and Warehouse Company Building, 1000 W. Morehead St., Charlotte, 00001640

NORTH DAKOTA

Morton County

German Evangelical St. Johns Church—Deutsche Evangelische St. Johannes Kirche, 624 Church Ave., Hebron, 00001642

WISCONSIN

Jefferson County

Jefferson High School, 201 S. Copeland Ave., Jefferson, 00001643

WYOMING

Converse County

Morton Mansion, 425 Center St., Douglas, 00001644

To assist in the preservation of this historic property the comment period for the following resource has been shortened to three (3) days:

MISSOURI

Greene County

Second Baptist Church (Colored), 729 North Washington, Springfield, 00001620

[FR Doc. 00–32203 Filed 12–18–00; 8:45 am]

BILLING CODE 4310–70–U

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–440]

Certain 4-Androstenediol; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 13, 2000, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of LPJ, Inc. of Seymour, Illinois. An amendment to the complaint was filed on December 5, 2000. The complaint, as amended, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of

certain 4-Androstenediol by reason of infringement of claims 1–4 of U.S. Letters Patent 5,880,117. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after a hearing, issue a permanent general exclusion order and permanent cease and desist orders.

ADDRESSES: The complaint, as amended, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov).

FOR FURTHER INFORMATION CONTACT: Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2574.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (1998).

Scope of Investigation

Having considered the complaint, the U.S. International Trade Commission, on December 13, 2000, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain 4-Androstenediol by reason of infringement of claims 1, 2, 3, or 4 of U.S. Letters Patent 5,880,117, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—LPJ Research, Inc, 205 South Main Street, P.O. Box 160, Seymour, Illinois 61875.

(b) The respondent is the following company alleged to be in violation of section 337, and the party upon which the complaint is to be served—Changzhou Huabang Pharmaceutical Group, Ltd., 22/F, International Building, Changzhou, Jiangsu, China.

(c) Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, S.W., Room 401–P, Washington, D.C. 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern is designated as the presiding administrative law judge.

A response to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such response will be considered by the Commission if received no later than 20 days after the date of service by the Commission of the complaint and notice of investigation. Extensions of time for submitting a response to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: December 14, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–32309 Filed 12–18–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–288]

Ethyl Alcohol for Fuel Use: Determination of the Base Quantity of Imports

AGENCY: United States International Trade Commission.

ACTION: Notice of determination.

SUMMARY: Section 7 of the Steel Trade Liberalization Program Implementation Act, as amended (19 U.S.C. 2703 note), which concerns local feedstock requirements for fuel ethyl alcohol imported by the United States from CBI-beneficiary countries, requires the Commission to determine annually the U.S. domestic market for fuel ethyl alcohol during the 12-month period ending on the preceding September 30. The domestic market determination made by the Commission is to be used to establish the ''base quantity'' of imports that can be imported with a zero percent local feedstock requirement. The base quantity to be used by the U.S. Customs Service in the administration of the law is the greater of 60 million gallons or 7 percent of U.S. consumption as determined by the Commission. Beyond the base quantity of imports, progressively higher local feedstock requirements are placed on imports of fuel ethyl alcohol and mixtures from the CBI-beneficiary countries.

For the 12-month period ending September 30, 2000, the Commission has determined the level of U.S. consumption of fuel ethyl alcohol to be 1.61 billion gallons. Seven percent of this amount is 112.7 million gallons (these figures have been rounded). Therefore, the base quantity for 2001 should be 112.7 million gallons.

FOR FURTHER INFORMATION CONTACT: Devry Boughner (202) 205–3313, dboughner@usitc.gov, in the Commission's Office of Industries. For information on legal aspects of the investigation contact Mr. William Gearhart, wgearhart@usitc.gov, of the Commission's Office of the General Counsel at (202) 205–3091.

Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205–1810.

Background

For purposes of making determinations of the U.S. market for fuel ethyl alcohol as required by section 7 of the Act, the Commission instituted Investigation No. 332–288, Ethyl Alcohol for Fuel Use: Determination of

the Base Quantity of Imports, in March 1990. The Commission uses official statistics of the U.S. Department of Energy to make these determinations as well as the PIERS database of the Journal of Commerce, which is based on U.S. export declarations.

Section 225 of the Customs and Trade Act of 1990 (Pub. L. 101–382, August 20, 1990) amended the original language set forth in the Steel Trade Liberalization Program Implementation Act of 1989. The amendment requires the Commission to make a determination of the U.S. domestic market for fuel ethyl alcohol for each year after 1989.

Issued: December 14, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–32256 Filed 12–18–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–861 (Final)]

Certain Expandable Polystyrene Resins From Indonesia

Determination

On the basis of the record[1] developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury and the establishment of an industry in the United States is not materially retarded, by reason of imports from Indonesia of certain expandable polystyrene resins, provided for in subheading 3903.11.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted this investigation effective November 22, 1999, following receipt of a petition filed with the Commission and the Department of Commerce by BASF Corp., Mount Olive, NJ; Huntsman Expandable Polymers Co. LC, Salt Lake City, UT; NOVA Chemicals, Inc., Moon Township, PA; and StyroChem U.S., Ltd., Radnor, PA. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by the Department of Commerce that imports of certain expandable polystyrene resins from Indonesia were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 9, 2000 (65 FR 48731, August 9, 2000). The hearing was held in Washington, DC, on November 7, 2000, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this review to the Secretary of Commerce on December 20, 2000. The views of the Commission are contained in USITC Publication 3377 (December 2000), entitled Certain Expandable Polystyrene Resins from Indonesia: Investigation No. 730–TA–861 (Final).

By order of the Commission.

Issued: December 13, 2000.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–32255 Filed 12–18–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. TA–201–72]

Extruded Rubber Thread

Determination

On the basis of the information in the investigation, the Commission determines, pursuant to section 202(b) of the Trade Act of 1974, that extruded rubber thread[1] is not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury to the domestic industry producing an article like or directly competitive with the imported article.

Background

Following receipt of a properly filed petition on June 5, 2000, by counsel on behalf of North American Rubber Thread, Fall River, MA, the Commission instituted investigation No. TA–201–72, Extruded Rubber Thread, under section 202 of the Trade Act of 1974 to determine whether extruded rubber thread is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

Notice of the institution of the Commission's investigation and of the scheduling of public hearings to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of June 22, 2000 (65 FR 38856). The hearing in connection with the injury phase of the investigation was held on September 6, 2000, in Washington, DC; all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the President on December 4, 2000. The views of the Commission are contained in USITC Publication 3375, December 2000, entitled Extruded Rubber Thread (Inv. No. TA–201–72).

By order of the Commission.

Issued: December 12, 2000.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–32252 Filed 12–18–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–423]

The Effects of EU Policies on the Competitive Position of the U.S. and EU Horticultural Products Sectors

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and scheduling of public hearing.

EFFECTIVE DATE: December 7, 2000.

FOR FURTHER INFORMATION CONTACT: For general information, Douglas Newman (202–205–3328; newman@usitc.gov), Tim McCarty (202–205–3324;

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[1] For purposes of this investigation, extruded rubber thread is defined as vulcanized rubber thread, obtained by extrusion of stable or concentrated natural rubber latex of any cross sectional shape, measuring from 0.18 mm (which is 0.007 inch or 140 gauge) to 1.42 mm (which is 0.056 inch or 18 gauge) in diameter. Such extruded rubber thread is classified in heading 4007.00 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS category is provided for convenience and Customs purposes, the written description of the merchandise is dispositive.

mccarty@usitc.gov), or Cathy Jabara (202–205–3309; jabara@usitc.gov), Agriculture and Forest Products Division, Office of Industries, or for information on legal aspects, William Gearhart (202–205–3091; wgearhart@usitc.gov), Office of the General Counsel, U.S. International Trade Commission. Hearing impaired persons can obtain information on this study by contacting the Commission's TDD terminal on (202) 205–1810. General information concerning the Commission may also be obtained by accessing its internet server (http://www.usitc.gov).

Background

In response to a letter received on November 16, 2000, from the United States Trade Representative, the Commission instituted an investigation for the purpose of preparing a report that will describe the effects of EU policies on the competitive position of the U.S. and EU horticultural products sectors generally, and for several specific products.

As requested, the Commission's report will include the following:

(1) A description of the U.S. and EU fresh and processed horticultural products sectors, including recent patterns of production, consumption, and trade;

(2) A description and analysis of the conditions of trade in various horticultural products between the U.S. and EU and third countries, including tariff treatment and use of export subsidies;

(3) A description and analysis of EU and member state domestic support programs and policies used to assist horticultural products producers, shippers, and exporters; and

(4) An analysis of the effects of EU policies on trade between the U.S. and EU industries in specific horticultural products sectors, especially the effects of tariffs and assistance programs and other significant factors, such as production and marketing costs, exchange rates, and prices.

The report will specifically address the following horticultural products identified by the USTR: Citrus (including fresh oranges, fresh clementines, fresh lemons, and orange juice), deciduous fruit (including fresh apples, fresh pears, fresh peaches, and processed peaches), dried prunes, tree nuts (including almonds, walnuts, and hazelnuts), tomatoes (including fresh tomatoes and processed tomatoes), and wine. The USTR stated that it intends to make available to the public the portion of the report that addresses points (1)–(3) above, and that the portion of the report that addresses point (4) above will be national security classified.

Preliminary Written Comments

In order to assist the Commission in identifying the issues affecting the above sectors, the Commission requests that interested parties provide preliminary written comments on such issues by March 1, 2001. All preliminary written comments should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW, Washington, DC 20436. Interested parties are also encouraged to provide further information at the public hearing and in prehearing and posthearing briefs/statements.

Public Hearing

A public hearing in connection with the investigation will be held at the U.S. International Trade Commission Building, 500 E Street, SW, Washington, DC, beginning at 9:30 a.m. on April 26, 2001. All persons will have the right to appear, by counsel or in person, to present information and be heard. Requests to appear at the public hearing should be filed with the Secretary, United States International Trade Commission, 500 E Street, SW, Washington, DC 20436, no later than 5:15 p.m., April 12, 2001. Any prehearing briefs (original and 14 copies) should be filed not later than 5:15 p.m., April 16, 2001; the deadline for filing posthearing briefs or statements is 5:15 p.m., June 11, 2001. In the event that, as of the close of business, April 12, 2001, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or non-participant may call the Secretary to the Commission (202–205–1806) after April 12, 2001, to determine whether the hearing will be held.

Written Submissions

In lieu of, or in addition to, participating in the hearing, interested persons are invited to submit written statements concerning the matters to be addressed by the Commission in its report on this investigation. Commercial or financial information which a submitter desires the Commission to treat as confidential must be provided on separate sheets of paper, each clearly marked ''Confidential Business Information'' at the top. All submissions requesting confidential treatment must conform with the requirements of § 201.6 of the Commission's rules of practice and procedure (19 CFR 201.6). All written submissions, except for confidential business information, will be made available in the Office of the Secretary of the Commission for inspection by interested persons. To be assured of consideration by the Commission, written statements relating to the Commission's report should be submitted to the Commission in accordance with § 201.8 of the Commission's rules at the earliest practical date and should be received no later than the close of business on June 11, 2001. All submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW, Washington, DC 20436. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Issued: December 12, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–32253 Filed 12–18–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–437]

Certain Synchronous Dynamic Random Access Memory Devices and Modules and Products Containing Same; Notice of Decision To Review an Initial Determination Terminating the Investigation Based on Withdrawal of the Complaint

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination (ID) (Order No. 1) issued by the presiding administrative law judge (ALJ) terminating the above-captioned investigation based on withdrawal of the complaint by complainant Rambus Inc. The Commission does not wish to receive written submissions from the parties in connection with its review of the ID.

FOR FURTHER INFORMATION CONTACT: Tim Yaworski, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3096. Hearing-impaired persons are

advised that information on this matter can be obtained by contacting the Commission's TDD Terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (http://www.usitc.gov).

SUPPLEMENTARY INFORMATION:

The Commission instituted this investigation on October 5, 2000, based on a complaint filed by Rambus Inc. of Mountain View, California. The complaint alleged a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, based on infringement of claims of three U.S. patents (U.S. Letters patent 6,038,195, U.S. Letters Patent 5,953,263, and U.S. Letters Patent 6,034,918) owned by complainant. The respondents named in the investigation were Hyundai Electronics Industries Co., Ltd. of Korea and Hyundai Electronics America of San Jose, California (collectively ''Hyundai''). The investigation was assigned to Administrative Lay Judge Sidney Harris. 65 FR 60684. On October 6, 2000, complainant Rambus moved to withdraw its complaint and terminate the investigation. Rambus' motion was responded to by Hyundai and the Commission investigative attorney (''IA''). On November 8, 2000, the ALJ issued an ID terminating the investigation based on Rambus' withdrawal of its complaint, but with the condition that, if the Commission institutes a subsequent investigation based on a complaint filed by Rambus involving one or more of the same patents, then such investigation should be assigned to the same ALJ, unless exceptional circumstances require assignment to another ALJ. The ALJ found that Rambus had engaged in impermissible judge shopping. Rambus and the IA petitioned for review of the ID.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and section 210.43(d) of the Commission's Rules of Practice and Procedure, 19 CFR 210.43(d).

Copies of the ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Copies of these documents may also be downloaded from the Commission's Internet server at http://www/usitc.gov.

By order of the Commission.

Issued: December 13, 2000

Donna R. Koehnke,

Secretary.

[FR Doc. 00–32254 Filed 12–18–00; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA #207E]

Controlled Substances: Established Initial Aggregate Production Quotas for 2001

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of aggregate production quotas for 2001.

SUMMARY: This notice establishes initial 2001 aggregate production quotas for controlled substances in Schedules I and II of the Controlled Substances Act (CSA).

EFFECTIVE DATE: December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Frank L. Sapienza, Chief, Drug & Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in Schedules I and II. This responsibility has been delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations.

The 2001 aggregate production quotas represent those quantities of controlled substances that may be produced in the United States in 2001 to provide adequate supplies of each substance for: The estimated medical, scientific, research and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks (21 U.S.C. 826(a) and 21 CFR 1303.11). These quotas do not include imports of controlled substances for use in industrial processes.

On October 4, 2000, a notice of the proposed initial 2001 aggregate production quotas for certain controlled substances in Schedules I and II was published in the **Federal Register** (65 FR 59214). All interested persons were invited to comment on or object to these proposed aggregate production quotas on or before November 3, 2000.

Five companies commented on a total of twenty Schedules I and II controlled substances within the published comment period. The companies commented that the proposed aggregate production quotas for alfentanil, amphetamine, dextropropoxyphene, dihydrocodeine, dihydromorphine, fentanyl, gamma-hydroxybutyric acid, hydrocodone (for sale), hydromorphone, levorphanol, methamphetamine (for conversion), methylphenidate, noroxymorphone (for conversion), opium, oxycodone (for conversion), oxymorphone and sufentanil were insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and for the establishment and maintenance of reserve stocks. The companies also commented that the proposed aggregate production quotas for codeine (for conversion), hydrocodone (for conversion) and morphine (for conversion) could be reduced.

In addition, two comments were received after the published comment period had ended (dated November 6, 2000 and November 10, 2000). These comments requested that the aggregate production quotas for amphetamine, anileridine, methadone (for sale), methadone intermediate and methylphenidate be increased. These comments were taken into consideration in determining the established initial 2001 aggregate production quotas for these substances.

DEA has taken into consideration the above comments along with the relevant 2000 manufacturing quotas, current 2000 sales and inventories, 2001 export requirements and research and product development requirements. Based on this information, the DEA has adjusted the initial aggregate production quotas for alfentanil, dihydrocodeine, dihydromorphine, hydrocodone (for sale), hydrocodone (for conversion), levorphanol, methamphetamine (for conversion), noroxymorphone (for conversion), opium and sufentanil to meet the legitimate needs of the United States.

Regarding amphetamine, anileridine, codeine (for conversion), dextropropoxyphene, fentanyl, gamma-hydroxybutyric acid, hydromorphone, methadone (for sale), methadone intermediate, methylphenidate, morphine (for conversion), oxycodone (for conversion) and oxymorphone, the DEA has determined that the proposed initial 2001 aggregate production quotas are sufficient to meet the current 2001 estimated medical, scientific, research

and industrial needs of the United States.

Pursuant to section 1303 of title 21 of the Code of Federal Regulations, the Deputy Administrator of the DEA will, in early 2001, adjust aggregate production quotas and individual manufacturing quotas allocated for the year based upon 2000 year-end inventory and actual 2000 disposition data supplied by quota recipients for each basic class of Schedule I or II controlled substance.

Therefore, under the authority vested in the Attorney General by section 306 of the Controlled Substances Act of 1970 (21 U.S.C. 826), delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations, and redelegated to the Deputy Administrator pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations, the Deputy Administrator hereby orders that the 2001 initial aggregate production quotas for the following controlled substances, expressed in grams of anhydrous acid or base, be established as follows:

Basic Class	Established Initial 2001 Quotas
Schedule I	
2,5-Dimethoxyamphetamine	15,501,000
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2
3-Methylfentanyl	14
3-Methylthiofentanyl	2
3,4-Methylenedioxyamphetamine (MDA)	25
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	30
3,4-Methylenedioxymethamphetamine (MDMA)	10
3,4, 5-Trimethoxyamphetamine	2
4-Bromo-2,5-Dimethoxyamphetamine (DOB)	2
4-Bromo-2,5-Dimethoxyphenethylamine (2–CB)	2
4-Methoxyamphetamine	201,000
4-Methylaminorex	2
4-Methyl-2,5-Dimethoxyamphetamine (DOM)	2
5-Methoxy-3,4-Methylenedioxyamphetamine	2
Acetyl-alpha-methylfentanyl	2
Acetyldihydrocodeine	2
Acetylmethadol	2
Allylprodine	2
Alphacetylmethadol	7
Alpha-ethyltryptamine	2
Alphameprodine	2
Alphamethadol	2
Alpha-methylfentanyl	2
Alpha-methylthiofentanyl	2
Aminorex	7
Benzylmorphine	2
Betacetylmethadol	2
Beta-hydroxy-3-methylfentanyl	2
Beta-hydroxyfentanyl	2
Betameprodine	2
Betamethadol	2
Betaprodine	2
Bufotenine	2
Cathinone	9
Codeine-N-oxide	2
Diethyltryptamine	2
Difenoxin	9,000
Dihydromorphine	771,000
Dimethyltryptamine	2
Gamma-hydroxybutyric acid	15,000,000
Heroin	2
Hydroxypethidine	2
Lysergic acid diethylamide (LSD)	37
Marihuana	350,000
Mescaline	7
Methaqualone	19
Methcathinone	11
Morphine-N-oxide	2
N,N-Dimethylamphetamine	7
N-Ethyl-1-Phenylcyclohexylamine (PCE)	5
N-Ethylamphetamine	7
N-Hydroxy-3,4-Methylenedioxyamphetamine	2
Noracymethadol	2
Norlevorphanol	2
Normethadone	7
Normorphine	7
Para-fluorofentanyl	2
Pholcodine	2

Basic Class	Established Initial 2001 Quotas
Propiram	415,000
Psilocybin	2
Psilocyn	2
Tetrahydrocannabinols	131,000
Thiofentanyl	2
Trimeperidine	2
Schedule II	
1-Phenylcyclohexylamine	12
1-Piperidinocyclohexanecarbonitrile (PCC)	10
Alfentanil	3,500
Alphaprodine	2
Amobarbital	12
Amphetamine	10,958,000
Cocaine	251,000
Codeine (for sale)	43,248,000
Codeine (for conversion)	59,051,000
Dextropropoxyphene	134,401,000
Dihydrocodeine	474,000
Diphenoxylate	401,000
Ecgonine	51,000
Ethylmorphine	12
Fentanyl	440,000
Glutethimide	2
Hydrocodone (for sale)	22,325,000
Hydrocodone (for conversion)	18,000,000
Hydromorphone	1,409,000
Isomethadone	12
Levo-alphacetylmethadol (LAAM)	41,000
Levomethorphan	2
Levorphanol	23,000
Meperidine	10,168,000
Methadone (for sale)	8,347,000
Methadone (for conversion)	60,000
Methadone Intermediate	9,503,000
Methamphetamine	3,187,000
850,000 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 2,286,000 grams for methamphetamine for conversion to a Schedule III product; and 51,000 grams for methamphetamine (for sale)	
Methylphenidate	14,957,000
Morphine (for sale)	14,706,000
Morphine (for conversion)	117,675,000
Nabilone	2
Noroxymorphone (for sale)	25,000
Noroxymorphone (for conversion)	4,000,000
Opium	630,000
Oxycodone (for sale)	46,680,000
Oxycodone (for conversion)	449,000
Oxymorphone	264,000
Pentobarbital	22,037,000
Phencyclidine	40
Phenmetrazine	2
Phenylacetone	10
Secobarbital	12
Sufentanil	1,700
Thebaine	65,596,000

The Deputy Administrator further orders that aggregate production quotas for all other Schedules I and II controlled substances included in sections 1308.11 and 1308.12 of title 21 of the Code of Federal Regulations be established at zero.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866.

This action does not preempt or modify any provisions of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this action does not have federalism implications warranting the application of Executive Order 13132.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The establishment of aggregate production quotas for Schedules I and II controlled substances is mandated by law and by international treaty obligations. The quotas are necessary to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and the establishment and maintenance of

reserve stocks. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

This action meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

This action will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1966. This action will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

The Drug Enforcement Administration makes every effort to write clearly. If you have suggestions as to how to improve the clarity of this regulation, call or write Frank L. Sapienza, Chief, Drug & Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, D.C. 20537, telephone (202) 307–7183.

Dated: December 11, 2000.

Julio F. Mercado,

Deputy Administrator.

[FR Doc. 00–32299 Filed 12–18–00; 8:45 am]

BILLING CODE 4410–09–M

NATIONAL CAPITAL PLANNING COMMISSION

Public Comment Period on the Draft Memorials and Museums Master Plan

AGENCY: National Capital Planning Commission.

ACTION: Availability of the draft memorials and museums master plan and opening of the public comment period.

SUMMARY: The Joint Task Force on Memorials, comprised of the National Capital Planning Commission, the Commission of Fine Arts, and the National Capital Memorial Commission, has opened a 45-day public comment period on a Draft Memorials and Museums Master Plan. The draft master plan identifies 102 sites for new memorials and museums and provides general guidelines for where and how these facilities should be developed, as well as siting criteria and implementation strategies.

DATES: Public testimony on the proposal will be taken at a public meeting from 5:30 pm to 8:30 pm on Thursday, January 11, 2001.

ADDRESSES: The meeting will be held at the National Capital Planning Commission Office, 401 9th Street, NW, North Lobby, Suite 500, Washington, DC 20576.

SUPPLEMENTARY INFORMATION: Copies of the master plan are available from the National Capital Planning Commission, 401 9th Street, NW, North Lobby, Suite 500, Washington, DC 20576. Individuals interested in testifying at the meeting should call the National Capital Planning Commission, 202–482–7200, no later than 12:00 Noon the day before the meeting to register in advance. Members of the public who wish to testify and have not signed up in advance may sign up at the meeting before the start of the session. Each testifier will be limited to five minutes, and will generally be scheduled on a first-come basis. Written comments may be submitted before, during, or after the public meeting. Comments may be mailed to the attention of Ron Wilson at the National Capital Planning Commission. Comments may also be sent by fax: 202–482–7272 or by e-mail: *info@ncpc.gov.* All comments should be received by the end of the comment period, January 31, 2001.

FOR FURTHER INFORMATION CONTACT: Ron Wilson, 202–482–7242.

Dated: December 11, 2000.

Ash Jain,

General Counsel and Legislative Liaison, National Capital Planning Commission.

[FR Doc. 00–32210 Filed 12–18–00; 8:45 am]

BILLING CODE 7520–01–U

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–255]

Consumers Energy Co.; Palisades Plant; Notice of Consideration of Approval of Transfer of Operating Authority Under Facility Operating License and Conforming Amendment, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under 10 CFR 50.80 approving the transfer of operating authority under Facility Operating License No. DPR–20 for the Palisades Plant, currently held by Consumers Energy Company (CEC), as owner and licensed operator of the Palisades Plant. The transfer would be to an operating company called Nuclear Management Company, LLC (NMC). The Commission is also considering amending the license for administrative purposes to reflect the proposed transfer. If authorized to operate the facility, NMC, according to the application described below, will also act as the general licensee for the Independent Spent Fuel Storage Installation at the Palisades Plant, pursuant to 10 CFR 72.210.

By application dated November 21, 2000, seeking approval of the transfer, the Commission was informed that CEC has entered into a Nuclear Power Plant Operating Services Agreement with NMC. Under this Agreement, NMC is to assume exclusive responsibility for the operation and maintenance of the Palisades Plant. CEC's ownership of the Palisades Plant will not be affected by the proposed transfer of operating authority. Likewise, CEC's entitlement to capacity and energy from the Palisades Plant will not be affected by the transfer of operating authority. No physical changes to the facility or operational changes are being proposed in the application.

The proposed amendment would reflect the transfer of authority under the license to use and operate the Palisades Plant from CEC to NMC. Consistent with this designation of NMC as the entity authorized to use and operate the Palisades Plant, the amendment would also reflect that NMC would be authorized to receive, possess, and use the related licensed nuclear materials, including byproduct and special nuclear material. In addition, the amendment would reflect that CEC would be authorized to possess, but not use or operate, the Palisades Plant.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly,

through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility which does no more than conform the license to reflect the transfer action involves no significant hazards consideration. No contrary determination has been made with respect to this specific license amendment application. In light of the generic determination reflected in 10 CFR 2.1315, no public comments with respect to significant hazards considerations are being solicited, notwithstanding the general comment procedures contained in 10 CFR 50.91.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

By January 8, 2001, any person whose interest may be affected by the Commission's action on the application may request a hearing, and, if not the applicants, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart M, ''Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.1306, and should address the considerations contained in 10 CFR 2.1308(a). Untimely requests and petitions may be denied, as provided in 10 CFR 2.1308(b), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.1308(b)(1)–(2).

Requests for a hearing and petitions for leave to intervene should be served upon Arunas T. Udrys, Esquire, Consumers Energy Company, 212 West Michigan Avenue, Jackson, Michigan 49201 (tel: 517–788–2513; fax: 517–788–0768; e-mail: atudrys@cmsenergy.com); and the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (e-mail address for filings regarding license transfer cases only: OGCLT@NRC.gov); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.1313.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, by January 18, 2001, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated November 21, 2000. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at one White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Library component on the NRC Web site, *http://www.nrc.gov* (the Electronic Reading Room).

Dated at Rockville, Maryland this 11th day of December 2000.

For the Nuclear Regulatory Commission,

Tae J. Kim,

Acting Chief, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00–32305 Filed 12–18–00; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission

DATES: Weeks of December 18, 25, 2000, January 1, 8, 15, 22, 2001

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland

STATUS: Public and Closed

MATTERS TO BE CONSIDERED:

Week of December 18

Tuesday, December 19, 2000

8:30 a.m.
Discussion of Management Issues (Closed—Ex. 2 and 6)

Wednesday, December 20, 2000

9:30 a.m.
Briefing on the Status of the Fuel Cycle Facility Oversight Program Revision (Public Meeting) (Contact: Walt Schwink, 301–415–7253)
This meeting will be webcast live at the Web address—

www.nrc.gov/live.html

3:30 p.m.
Affirmation Session (Public Meeting) (If needed)

Week of December 25—Tentative

There are no meetings scheduled for the Week of December 25.

Week of January 1, 2001—Tentative

There are no meetings scheduled for the Week of January 1, 2001.

Week of January 8, 2001—Tentative

Tuesday, January 9, 2001

9:30 a.m.
Briefing on EEO Program (Public Meeting) (Contact: Irene Little, 301–415–7380)

Wednesday, January 10, 2001

9:25 a.m.
Affirmation Session (Public Meeting) (If needed)

9:30 a.m.
Briefing on Status of Nuclear Materials Safety (Public Meeting) (Contact: Claudia Seelig, 301–415–7243)
This meeting will be webcast live at the Web address—

www.nrc.gov/live.html

Week of January 15, 2001—Tentative

Wednesday, January 17, 2001

9:25 a.m.
Affirmation Session (Public Meeting) (If needed)

9:30 a.m.
Briefing on Status of Nuclear Reactor Safety (Public Meeting) (Contact: Mike Case, 301–415–1134)
This meeting will be webcast live at the Web address—

www.nrc.gov/live.html

Week of January 22—Tentative

There are no meetings scheduled for the Week of January 22.

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)–(301) 415–1292. Contact person for more information: Bill Hill (301) 415–1661.

The NRC Commission Meeting Schedule can be found on the Internet at:

http://www.nrc.gov/SECY/smj/schedule.htm

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, DC 20555 (301–415–1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: December 15, 2000.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary

[FR Doc. 00–32404 Filed 12–15–00; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

OPM Criteria for IRS Broadbanding System

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This publicizes final criteria for broadbanding systems for the Internal Revenue Service (IRS). The Internal Revenue Service Restructuring and Reform Act of 1998 authorizes the Secretary of the Treasury to establish one or more broadbanding systems covering all or any portion of the IRS workforce under the General Schedule (GS). Title 5, United States Code, directs the Office of Personnel Management (OPM) to prescribe criteria for IRS broadbanding systems and specifies certain principles that such criteria must follow, at a minimum.

DATES: Effective December 19, 2000.

FOR FURTHER INFORMATION CONTACT: Gregory Zygiel, Workforce Compensation and Performance Service, Strategic Compensation Policy Center, OPM, 1900 E Street NW., Room 7305, Washington, DC 20415–8320, 202–606–8047, *strategiccomp@opm.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Internal Revenue Service Restructuring and Reform Act of 1998 (Public Law 105–206) authorizes the Secretary of the Treasury to establish one or more broadbanding systems covering all or any portion of the IRS workforce under the General Schedule (GS). Section 9509(b) of title 5, United States Code, directs OPM to prescribe criteria for IRS broadbanding systems and specifies certain principles that such criteria must follow, at a minimum. OPM publicized the interim criteria in the **Federal Register** on July 16, 1999, and requested comments.

The Criteria

OPM developed the criteria after conferring with the Department of the Treasury, the Internal Revenue Service, and the National Treasury Employees Union. The criteria are broadly written to give IRS the flexibility to establish pay practices that support mission accomplishment, and to base pay decisions on performance. The criteria incorporate lessons learned from previous experience with broadbanding under personnel demonstration projects.

Before implementing any broadbanding system under this authority, IRS must develop written plans, policies, and implementing procedures that address each relevant criterion, including descriptions of broadbanding structure(s), classification criteria, positions covered, the method of pay progression within a band, pay-setting policies, policies for paying supervisors or management officials, and policies for converting positions into broadbanding systems.

Section 9509(b)(3) of title 5, United States Code, requires that employees covered by IRS broadbanding systems remain subject to the laws and regulations covering General Schedule employees (*e.g.,* locality payments, the aggregate limitation on pay, premium pay, and recruitment and relocation bonuses and retention allowances), except as otherwise provided in the criteria.

Changes From the Interim Criteria

OPM made one change. We gave particular consideration to the unusual situation where an employee is moved out of the broadbanding system shortly after entering it. In this situation, we found that the regular conversion rules could produce an undesirable pay result. Therefore, we have modified the rules for converting employees back to the General Schedule pay system. The change affects only employees who move back to the General Schedule before any pay adjustment event (*e.g.,* any within-band increase, a promotion, or any systemwide pay adjustment) under the broadbanding system. The change ensures that these employees will not experience an unwarranted gain or an unwarranted loss in pay.

To make this change, we added one paragraph to Appendix B—Conversion into Broadbanding System, and revised Appendix C—Procedures for Converting Employees Back to the General Schedule Pay System.

Comments on the Interim Criteria

OPM received comments from three individuals. The commenters were concerned that broadbanding could lead to fewer and/or smaller pay increases for employees, and that broadbanding created the potential for inequitable treatment of employees. The commenters suggested that broadbanding systems align with the IRS's employee retention strategies, and that OPM require IRS to collect and report data to permit demographic analysis of broadbanding's effects.

OPM believes that the final criteria and existing laws and requirements address the commenters' concerns and suggestions appropriately.

Dated: December 7, 2000.

Office of Personnel Management.

Janice R. Lachance,

Director.

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I. Authority

Section 9509 of title 5, United States Code, as added by the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 (Public Law 105–206), provides the Secretary of the Treasury with the authority to establish one or more broadbanding systems covering all or any portion of the IRS workforce under the General Schedule (GS). Section 9509(b) directs the Office of Personnel Management (OPM) to prescribe criteria for IRS broadbanding systems and specifies certain principles that such criteria must follow, at a minimum.

II. Applicability

Section 9509(a) defines a ''broadbanded system'' as a system for grouping positions for pay, job evaluation, and other purposes that is different from the General Schedule pay and classification system established

under chapter 51 and subchapter III of chapter 53 of title 5, United States Code. Employees covered by IRS broadbanding systems are not covered by subchapter III of chapter 53 or by those provisions of chapter 51 that define General Schedule grades. However, selected provisions from those parts of law are used in applying parallel features to employees in IRS broadbanding systems, as provided in these criteria.

As required by 5 U.S.C. 9509(b)(3), employees covered by IRS broadbanding systems are to be treated as if they are General Schedule employees for the purpose of applying other laws and regulations governing General Schedule employees, except as otherwise provided in these criteria. Applicable laws and regulations include, but are not limited to: 5 U.S.C. 5304, authorizing locality-based comparability payments; 5 U.S.C. 5307, establishing a limitation on aggregate pay; 5 U.S.C. chapter 55, subchapter V, authorizing various forms of premium pay; and 5 U.S.C. 5753 and 5754, authorizing recruitment and relocation bonuses and retention allowances.

Note: Many title 5 provisions apply to Federal employees on a more general basis and do not base coverage on whether an employee is covered by the General Schedule system (*e.g.,* severance pay, leave, retirement, and insurance).

Employees in IRS broadbanding systems are not covered by the special salary rate program established under 5 U.S.C. 5305. However, IRS broadbanding systems may use a parallel authority to establish staffing supplements, which are linked to established special salary rates, as described in Appendix A.

These criteria apply only to broadbanding systems that cover General Schedule positions. Section 9509(b)(1)(B) of title 5, United States Code, authorizes the Secretary of the Treasury, with the prior approval of the Director of OPM, to include in a broadbanding system positions that otherwise would be subject to subchapter IV of chapter 53 (prevailing rate systems) or 5 U.S.C. 5376 (senior-level positions). Including such positions would require OPM's separate review and approval of a specific plan for that purpose. The criteria presented here are not intended to apply to broadbanding systems that include such positions.

III. Broadbanding System Plan

Before implementing any broadbanding system under this authority, IRS must develop a written plan that includes policies and implementing procedures to address each criterion that is relevant to the broadbanding system, including descriptions of broadbanding structure(s), positions covered, classification criteria, the method of pay progression within a band, policies for setting and adjusting pay, policies for paying supervisors or managerial employees, and policies for converting positions into broadbanding systems.

IV. Definitions

Under these criteria—

Band means a pay level or work level within a career path containing one or more General Schedule grades and related ranges of pay.

Broadbanding system means a system for grouping positions for pay, job evaluation, and other purposes that is different from the General Schedule system established under chapter 51 and subchapter III of chapter 53 of title 5, United States Code, as a result of combining the grades and related ranges of pay for one or more occupational series.

Career path means a grouping of one or more occupational series into broad occupational families or career tracks for job evaluation, pay, or other purposes. A career path may contain one or more bands.

Employee means an individual who would otherwise be covered by chapter 51 and subchapter III of chapter 53 of title 5, United States Code, if not covered by a broadbanding system.

Supervisor and *managerial employee* have the meaning given those terms in OPM's General Schedule Supervisory Guide.

V. Broadbanding Criteria

Criteria are provided below under the applicable principles listed in 5 U.S.C. 9509(b)(3)(A)–(F) (labeled A–F) and an additional principle (labeled G).

A. Ensure That the Structure of Any Broadbanding System Maintains the Principle of Equal Pay for Substantially Equal Work

IRS broadbanding systems must—

1. Link to the General Schedule.

2. Assign occupations to career paths based on the nature of work performed, the qualifications required, the normal career and pay progression, and other characteristics of those occupations.

3. Combine General Schedule grades into bands following the criteria in B. The range of difficulty and responsibility of each band must be the same as the range of difficulty and responsibility of the band's constituent grades (*i.e.,* consistent with the grade level criteria in standards published by OPM in accordance with 5 U.S.C. 5105) and must represent the normal range of work performed in the organization.

4. Place positions into bands within career paths in accordance with—

a. Classification standards published by OPM under 5 U.S.C. 5105; or

b. Any agency guidance which places a position within its correct band and career path (but which need not be sufficient to determine a position's correct General Schedule grade).

5. Not include law enforcement officers covered by special salary rates under section 403 of the Federal Employees Pay Comparability Act of 1990 in the same band as non-law enforcement officers when the maximum grade in the band is any one of grades 3 through 10.

6. Use established General Schedule rates of pay (including any applicable locality rates or special salary rates) for premium pay purposes under subchapter V of chapter 55 of title 5, United States Code, and 5 CFR part 550, subpart A (*i.e.,* for the purpose of determining the maximum hourly overtime rate and the biweekly premium pay limitation).

B. Establish the Minimum and Maximum Number of Grades That May Be Combined Into Bands

A band under an IRS broadbanding system may contain—

1. A minimum of one General Schedule grade.

2. A maximum of—

a. Eight General Schedule grades when grades 13, 14, and 15 are not included in the band.

b. Five General Schedule grades when grade 13 is included, but neither grade 14 nor 15 is included in the band.

c. Three General Schedule grades when grade 14 is included, but grade 15 is not included in the band.

d. Two General Schedule grades when grade 15 is included in the band.

C. Establish the Requirements for Setting the Minimum and Maximum Rates of Pay in a Band

1. The minimum rate of basic pay for each band must equal the minimum rate of basic pay payable under 5 U.S.C. 5332 for the lowest General Schedule grade in that band. The maximum rate of basic pay for each band must equal the maximum rate of basic pay payable under 5 U.S.C. 5332 for the highest General Schedule grade in that band.

a. Notwithstanding C1, preceding, the maximum rates of basic pay for bands covering law enforcement officers must equal the maximum special salary rates for grades 3 through 10 established under section 403 of the Federal

Employees Pay Comparability Act of 1990, where applicable.

b. The minimum and maximum rates of basic pay that define each band must be adjusted at the same time and in the same manner as adjustments are made in the corresponding minimum and maximum General Schedule rates of basic pay under 5 U.S.C. 5303 or similar provision of law.

2. The maximum rate of basic pay for any band may not exceed the maximum rate of basic pay for grade 15.

3. Employees in IRS broadbanding systems are not covered by the special salary rate authority in 5 U.S.C. 5305. However, IRS broadbanding systems may provide for the use of staffing supplements instead of special salary rates under Appendix A of these criteria. If special salary rates are not replaced with staffing supplements, special rate employees must be converted into a broadbanding system under the procedures established in Appendix B of these criteria.

4. Only employees receiving retained rates of pay under subchapter VI of chapter 53 of title 5, United States Code, as applied in the broadbanding system, or in an approved staffing supplement category may receive rates of pay that exceed the locality-adjusted band maximum rates.

D. Establish the Requirements for Adjusting the Pay of an Employee Within a Band

1. IRS broadbanding systems must include—

a. Policies for adjusting the pay of an employee within a band, including—

(1) Adjustments made in accordance with paragraphs D2a and D3a; and

(2) Increases based on individual factors such as an employee's performance, skills, or competencies and/or time at pay level, except that such increases may not be based solely on time at pay level. Increases that advance an employee's relative position in a band (*i.e.,* exceed the adjustments made in accordance with paragraphs D2a and D3a) may be paid only to employees whose performance meets or exceeds retention standards.

b. Policies concerning which level of management will make pay adjustment decisions for employees.

c. Principles for managing pay progression and payroll costs associated with basic pay adjustments. IRS must provide funding for salary increases under its broadbanding systems. Because broadbanding systems provide more choices on how to distribute pay to employees, it is necessary to have an overall budget to manage the costs associated with such choices. At a minimum, the salary increase budget must include funds equal to the amounts that would be required for individual pay adjustments made at the time of schedule adjustments under 5 U.S.C. 5303 (or similar provision of law) and locality-based comparability payments under 5 U.S.C. 5304 (or similar provision of law). A salary increase budget must meet salary cost objectives and be consistent with policies and procedures for adjusting pay under a broadbanding system that are established to ensure equal pay for work of equal value.

2. IRS broadbanding systems must provide for—

a. Making adjustments in the rates of basic pay for all employees who are not supervisors or managerial employees equivalent to the annual adjustments provided to General Schedule employees under 5 CFR 531.205. Employees on pay retention must be granted 50 percent of the increase in the maximum rate of basic pay for their band.

b. The payment of locality-based comparability payments for employees covered by 5 U.S.C. 5304 and 5 CFR part 531, subpart F, and special geographic adjustments for law enforcement officers covered by section 404 of the Federal Employees Pay Comparability Act of 1990 and 5 CFR part 531, subpart C. (See Appendix A of these criteria for information on possible staffing supplements.)

3. IRS pay adjustment policies may provide for—

a. Determining the circumstances under which adjustments in rates of basic pay may be granted to supervisors or managerial employees up to the equivalent of the annual adjustments provided to General Schedule employees under 5 CFR 531.205. However, an employee's rate of basic pay may not fall below the minimum rate of his or her band as a result of receiving less than the full adjustment.

b. Reducing an employee's rate of basic pay within a band, but only for unacceptable performance, misconduct, or loss of supervisory status (if such loss results in reversal of a within-band adjustment granted at the time of placement in a supervisory position). Any reductions based on unacceptable performance or misconduct are adverse actions under 5 U.S.C. 7512.

c. Control points within bands. Control points are dollar points within bands that limit or restrict pay-setting or the movement of employees through the rate range of the band. If control points are used, IRS broadbanding systems must include policies on the number of control points within bands and how they are derived (*e.g.,* as a percentage of the rate range) and applied (*i.e.,* the circumstances under which an employee's rate of pay may be set or adjusted at, above, or below a control point).

E. Establish the Requirements for Setting the Pay of a Supervisory Employee Whose Position Is in a Broad Band or Who Supervises Employees Whose Positions Are in Broad Bands

1. IRS broadbanding systems may provide for a separate broadbanding system or career path for supervisors and managerial employees.

2. A supervisor's or managerial employee's rate of pay may not be based on the salaries of the employees he or she supervises or manages.

F. Establish the Requirements and Methodologies for Setting the Pay of an Employee Upon Conversion to a Broadbanding System, Initial Appointment, Change of Position or Type of Appointment (Including Promotion, Demotion, Transfer, Reassignment, Reinstatement, Placement in Another Broad Band, or Movement to a Different Geographic Location), and Movement Between a Broadbanding System and Another Pay System

1. Conversion into a broadbanding system. IRS broadbanding systems must include policies for determining the career path, band, and pay rate for employees upon conversion into the system consistent with the provisions in Appendix B. IRS broadbanding systems may also include policies for making prorated within-grade increase or career-ladder promotion payments to employees as an adjustment in basic pay or a lump-sum payment upon conversion from the General Schedule to a broadbanding system consistent with the provisions in Appendix B.

2. Pay-setting policies. IRS broadbanding systems must include policies for determining an employee's career path, band, and rate of basic pay upon initial appointment, promotion, demotion, transfer, reassignment, or placement in a different band or career path. The methods used to set pay must be consistent with the principle of equal pay for substantially equal work.

a. Pay must be set at least at the minimum rate and must not exceed the maximum rate of basic pay of the band to which assigned (unless pay retention applies).

b. Policies must specify the conditions under which pay may be set above the minimum rate of the band and the amount of any minimum or maximum pay increase upon

promotion. The time-in-grade provisions in 5 CFR 300.601–605 do not apply to employees under a broadbanding system.

c. Upon movement to a different geographic area, locality-based comparability payments and special pay adjustments for law enforcement officers must be redetermined and paid in accordance with 5 CFR part 531, subparts F and C, respectively. Staffing supplements must also be redetermined consistent with the provisions in Appendix A of these criteria.

d. Movement of an employee to a band with a lower maximum rate of basic pay than the employee's former band is equivalent to a reduction in grade for the purpose of chapters 43 and 75 of title 5, United States Code.

3. Conversion to the General Schedule. Agencies must use the procedures in Appendix C of these criteria for determining an employee's GS equivalent grade and pay rate upon conversion from a broadbanding system to the General Schedule.

G. Conform Related Provisions of Law and Regulations to Broadbanding Systems

1. For provisions of chapter 51 that apply to the determination of General Schedule grades, other than sections 5104 and 5105, the term ''grade'' is deemed to mean ''band within a career path''.

2. The provisions in these criteria related to grade and pay retention are based on the current grade and pay retention authority in subchapter VI of Chapter 53 of title 5, United States Code, and 5 CFR part 536. When applying the grade and pay retention provisions, the term ''band'' has the same meaning as ''grade'' under the statute and regulations. Under 5 U.S.C. 9509(c), the Secretary of the Treasury may provide for variations from the grade and pay retention authority for employees who are covered by broadbanding systems with prior approval of the Director of OPM and in accordance with a plan for implementing such variations.

3. When applying paragraph (4) in the definition of ''reasonable offer'' in the severance pay provisions at 5 CFR part 550.703 to employees covered by IRS broadbanding systems, the term ''band'' has the same meaning as ''grade''. When applying paragraph (4), IRS will also consider a position one band below the employee's current band level a ''reasonable offer'' in the case of a broadbanding system under which the next lower band comprises two or more grades.

Appendix A—Staffing Supplements

Internal Revenue Service (IRS) broadbanding systems may use staffing supplements instead of the special salary rate authority in 5 U.S.C. 5305 under the following terms and conditions:

A. If an employee is assigned to an occupational series and geographic area covered by a special salary rate under 5 U.S.C. 5305 and is in a band where the maximum adjusted rate for the banded GS grades is a special rate that exceeds the maximum GS locality rate under 5 U.S.C. 5304 (or similar provision of law) for the banded grades, the employee is eligible for a staffing supplement.

B. Conversion. Upon conversion, the employee's broadbanding rate of basic pay is established by dividing the employee's old GS adjusted rate (the higher of the special rate or locality rate) by the staffing factor. The staffing factor is determined by dividing the maximum special rate for the banded grades by the GS unadjusted rate corresponding to that special rate (step 10 of the GS rate for the same grade as the special rate). The employee's staffing supplement is derived by multiplying the employee's broadbanding rate of basic pay by the staffing factor minus one. The employee's final staffing supplement-adjusted rate equals the employee's broadbanding rate of basic pay plus the staffing supplement. This amount will equal the employee's former GS adjusted rate of pay. Since the employee's total pay immediately after conversion into the broadbanding system will be the same as immediately before conversion, adverse action and pay retention provisions do not apply.

C. Formulas. The conversion rules in paragraph B of Appendix A of these criteria are expressed by the following formulas:

$$1.\ \text{Staffing Factor} = \frac{\text{Maximum special rate for banded grades}}{\text{Unadjusted GS rate corresponding to that special rate}}$$

$$2.\ \text{Broadbanding Basic Rate} = \frac{\text{Old GS adjusted rate (special or locality rate)}}{\text{Staffing Factor}}$$

$$3.\ \text{Staffing Supplement} = \text{Broadbanding Basic Rate} \times (\text{Staffing Factor} - 1)$$

$$4.\ \text{Salary at Conversion} = \text{Broadbanding Basic Rate} + \text{Staffing Supplement (sum will equal old GS adjusted rate)}$$

D. If an employee is in a band where the maximum GS adjusted rate for the banded grades is a locality rate, the broadbanding basic rate upon conversion into a broadbanding system is derived by dividing the employee's former GS adjusted rate (the higher of the locality rate or special rate) by the applicable locality pay factor (*e.g.,* 1.0905 in the Washington-Baltimore locality pay area in 2000). The employee's broadbanding locality-adjusted rate will equal the employee's former GS adjusted rate. Adverse action and pay retention provisions do not apply because there is no change in total salary.

E. The staffing supplement is added to the employee's broadbanding basic rate much like locality adjustments are added to basic pay. Any General Schedule or special rate schedule adjustment will require recomputation of the staffing supplement. Employees receiving a staffing supplement remain entitled to an underlying locality rate, which may, over time, supersede the need for a staffing supplement. If OPM discontinues or decreases a special rate schedule on which staffing supplements are based, pay retention rules will be applied, as appropriate. Upon geographic movement, an employee who receives a staffing supplement will have the supplement removed or recomputed to reflect any applicable special rates in the new location, consistent with paragraph C. Any

resulting reduction in pay is not an adverse action or a basis for pay retention.

F. The employee's broadbanding basic rate adjusted by the staffing supplement is basic pay for the same purposes as a locality rate under 5 CFR 531.606(b)—*i.e.,* for retirement, life insurance, premium pay, and severance pay purposes, and for advances in pay. The staffing supplement is also basic pay under 5 U.S.C. 5363 and subchapter II of chapter 75 for the limited purpose of determining whether a reduction in basic pay occurs at the point of an employee's conversion into a broadbanding system. The staffing supplement will also be used to compute worker's compensation payments and lump-sum payments for accrued and accumulated annual leave.

G. The Office of Personnel Management may approve staffing supplements for categories of employees within an IRS broadbanding system who are not in approved special rate categories for General Schedule employees, consistent with the provisions in 5 U.S.C. 5305(a) and (b).

Appendix B—Conversion into Broadbanding Systems

Internal Revenue Service (IRS) broadbanding systems must include policies for determining the career path, band, and pay rate for employees upon conversion into a broadbanding system under the following terms and conditions:

A. Employees may not suffer a reduction in total pay upon initial conversion to a broadbanding system.

B. If conversion into a broadbanding system is accompanied by a simultaneous geographic move, the employee's General Schedule pay entitlements in the new geographic area must be determined before converting the employee into the broadbanding system.

C. IRS broadbanding systems may include policies for making prorated within-grade increase or career-ladder promotion payments to employees as an adjustment in basic pay or a lump-sum payment upon conversion from the General Schedule to a broadbanding system under the following conditions:

1. The amount of any within-grade increase or career-ladder promotion payment may not be more than the prorated value of the employee's within-grade increase or career-ladder promotion at the time of conversion, based on the number of weeks of creditable service the employee has performed as of the date of initial conversion into the broadbanding system. There is no restriction on when such payments may be made.

2. A prorated within-grade increase or career-ladder promotion payment may be made only to an employee whose performance meets or exceeds retention standards at the time of conversion into a broadbanding system.

3. A within-grade increase payment may not be made to an employee receiving the maximum rate of pay for his or her grade (or band, if made after conversion into a broadbanding system) or a retained rate.

4. For employees receiving special rates before conversion into an IRS broadbanding system, the pay conversion described in paragraph D of Appendix B of these criteria must be applied before making any prorated within-grade increase or career-ladder promotion payment.

5. Adverse action and pay retention provisions do not apply to reductions in basic pay that occur when the IRS subtracts any prorated within-grade or career-ladder promotion increase from a career-ladder employee's rate of basic pay upon conversion back to the General Schedule as required by the introductory note in Appendix C (dealing with reconstruction of GS pay rates).

D. Special salary rate employees. If an IRS broadbanding system uses staffing supplements instead of special rates under 5 U.S.C. 5305, special rate employees must be converted into the system consistent with the provisions in Appendix A. If an IRS broadbanding system eliminates special salary rates, a new locality-adjusted rate of pay must be derived for each employee, as follows:

1. Divide the employee's adjusted rate of basic pay (the higher of the special rate or locality rate or similar adjusted rate) by the locality pay factor for the area (*e.g.,* 1.0905 for the Washington-Baltimore locality pay area in 2000) to determine the new broadbanding rate of basic pay. If the employee's broadbanding rate of basic pay exceeds the maximum rate of basic pay for the employee's band, the employee must be placed on pay retention.

2. Add the full locality adjustment to the employee's broadbanding rate of basic pay, including any retained rate. The locality adjustment is basic pay under 5 U.S.C. 5363 and subchapter II of chapter 75 for the limited purpose of determining whether a reduction in basic pay occurs at the point of an employee's conversion into a broadbanding system.

E. Employees on pay retention. Upon conversion, employees on pay retention must be placed in the band commensurate with the grade of their position. If possible, an employee's rate of basic pay will be placed within the assigned band. If not possible (because the employee's retained rate is higher than the maximum rate of basic pay of the band), the employee will be placed on pay retention.

F. Employees on grade retention. Upon conversion, employees on grade retention must be placed in the band that encompasses their retained grade until the original 2-year grade retention period expires. When the 2-year period expires, employees must be moved to the band that encompasses the grade of their position. If the rate of basic pay exceeds the maximum rate of the new band, the employee is entitled to pay retention.

Appendix C—Procedures for Converting Employees Back to the General Schedule Pay System

When an employee covered by a broadbanding system moves voluntarily or involuntarily to a General Schedule (GS) position, IRS must use the following procedures to convert the employee's band and pay rate to a GS-equivalent grade and rate of pay before the employee moves out of the system. IRS must determine the converted GS-equivalent grade and rate of pay before any accompanying geographic move, promotion, or other simultaneous action. The new employing organization must use the converted GS-equivalent grade and rate of pay in applying various pay administration rules that govern how pay is set in the GS position (e.g., rules for promotion, highest previous rate, and pay retention). For the purpose of those rules, the converted GS grade and rate of pay are deemed to have been in effect at the time the employee left the broadbanding system. The rules for determining the converted GS grade for pay administration purposes do not apply to the determination of an employee's GS-equivalent grade for other purposes, such as reduction-in-force or adverse action.

Note: The conversion procedures below do not apply to employees who involuntarily move back to the same General Schedule career-ladder position they held immediately before conversion into the broadbanding system prior to any pay adjustment event under the system (including any promotion, demotion, or systemwide pay adjustment). (A pay adjustment event does not include any prorated within-grade or career-ladder promotion pay increase received as part of conversion into the system or any across-the-board increase.) For such employees, IRS must subtract any prorated within-grade or career-ladder promotion payment and reconstruct the employee's grade and adjusted rate of pay under the General Schedule as if he or she had never entered the broadbanding system.

A. GS grade level determination—Upon conversion of an employee out of a broadbanding system to the GS pay system, IRS must determine the employee's GS-equivalent grade level under the following rules (except as otherwise provided in section C of these procedures):

1. Convert an employee in a band encompassing a single GS grade to that grade.

2. For an employee in a band encompassing more than one GS grade, compare the employee's adjusted rate of pay (including any locality adjustment (or similar geographic adjustment) or staffing supplement, as applicable) with the rates of pay in the highest applicable GS rate range for each grade encompassed by the employee's band. (For this purpose, a ''GS rate range'' includes a rate range in (1) the GS basic pay schedule, (2) the locality pay schedule (including any special geographic-adjusted schedule for law enforcement officers (LEOs)) for the locality pay area in which the position is located, or (3) the appropriate special rate schedule for the employee's occupational series and geographic location, as applicable.) If the employee's occupational series is a two-grade interval series, consider only odd-numbered grades between GS–5 and GS–11.

3. If the employee's adjusted rate of pay fits into an area of the rate range for a GS grade that does not overlap with the rate range of the next higher or lower grade in the same band, convert the employee to that GS grade.

4. If the employee's adjusted rate of pay fits into an area of the rate range for a GS grade that overlaps with the rate range of the next higher or lower grade in the same band, compare the employee's adjusted rate of pay

with the dollar midpoint of the overlap area. If the employee's adjusted rate of pay is lower than the dollar midpoint of the overlap area, convert the employee to the lower grade. If the employee's adjusted rate of pay is equal to or higher than the dollar midpoint of the overlap area, convert the employee to the higher grade.

5. Exception: An employee's converted GS grade may not be lower than the GS grade held by the employee immediately preceding a lateral conversion into the broadbanding system, unless the employee was retaining a GS grade immediately before conversion or the employee underwent a reduction in band while in the broadbanding system.

6. Exception: If an employee moves back to the General Schedule before any pay adjustment event under the broadbanding system (including any promotion, demotion, or systemwide pay adjustment), the employee's converted GS grade is the grade the employee held immediately before conversion into the broadbanding system. (A pay adjustment event does not include any prorated within-grade or career-ladder promotion pay increase received as part of conversion into the system or any across-the-board increase.)

B. GS pay rate determination—IRS must determine the employee's GS-equivalent rate of pay under the following rules (except as otherwise provided in section C). If an employee voluntarily moves back to the General Schedule before any pay adjustment event under the broadbanding system (as described in paragraph 6 of section A of these procedures), IRS must subtract any prorated basic pay increase received as part of conversion into the broadbanding system (including any applicable locality payment or staffing supplement associated with that increase) before applying these rules.

1. Convert the employee's adjusted rate of basic pay under the broadbanding system (including any locality adjustment (or similar geographic adjustment) or staffing supplement, as applicable) to a GS adjusted rate on the highest applicable rate range for the converted GS grade derived under section A of these procedures. (For this purpose, a ''GS rate range'' includes a rate range in (1) the GS basic pay schedule, (2) an applicable locality pay schedule (including any special geographic-adjusted schedule for LEOs), or (3) an applicable special rate schedule.)

2. If the highest applicable GS rate range is under a locality pay schedule, convert the employee's adjusted rate of pay under the broadbanding system to a GS locality rate of pay. Since this converted rate is used only as a basis for setting the employee's rate in the new position, do not adjust the converted rate to equal a standard step rate. The rate of basic pay underlying the converted GS locality rate of pay becomes the employee's converted GS unadjusted rate of basic pay. (If such an employee is also covered by a special rate schedule, add the special rate increment for the grade to the employee's converted GS unadjusted rate of basic pay to derive the employee's converted special rate.)

3. If the highest applicable GS rate range is a special rate range, convert the employee's adjusted rate of pay to a special rate. The converted special rate may fall between the standard step rates. The converted special rate is the employee's converted GS unadjusted rate of basic pay.

4. If the employee's adjusted rate of pay exceeds the maximum rate of the highest applicable rate range, apply the procedures provided in the table under C.2., following, to determine the employee's GS-equivalent pay rate. Use the employee's adjusted rate of pay and unadjusted rate of pay in place of ''adjusted retained rate'' and ''unadjusted retained rate,'' respectively.

C. Apply the following procedures to determine the converted GS-equivalent grade and pay rate for employees retaining a band or pay rate under the broadbanding system.

1. If an employee is retaining a band, apply the procedures in sections A and B using the grades encompassed by the employee's retained band to determine the employee's GS-equivalent retained grade and pay rate. The time in a retained band counts toward the 2-year limit on grade retention in 5 U.S.C. 5362.

2. If the employee's rate of pay under the broadbanding system is a retained rate, the employee's GS-equivalent grade is the highest grade encompassed in his or her band.

If the employee's adjusted retained rate* * *	Then* * *
(i) is less than the maximum rate of the highest applicable rate range.	apply the procedures in B.1.-B.3. to determine the employee's GS-equivalent pay rate.
(ii) exceeds the maximum rate of the highest applicable rate range and the employee is not in a special rate category.	convert the employee's unadjusted retained rate to a GS-equivalent retained rate.
(iii) exceeds the maximum rate of the highest applicable rate range and the employee is in a special rate category.	convert the employee's adjusted retained rate to a GS-equivalent retained rate.

D. Within-grade increase ''equivalent increase''determinations—Service under a broadbanding system is creditable for within-grade increase purposes upon conversion to the GS pay system. Basic pay increases (excluding across-the-board increases) under a broadbanding system are ''equivalent increases'' for the purpose of determining the beginning of a within-grade increase waiting period under 5 CFR 531.405(b). A performance-based increase in basic pay of any amount (including a zero increase) is considered a last ''equivalent increase'' for this purpose. Do not include any prorated within-grade or career-ladder promotion basic pay increases received as part of the conversion into the broadbanding system in determining an employee's last ''equivalent increase,'' if such increases were subtracted prior to determining the employee's GS-equivalent rate of pay under section B of these procedures.

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SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, D.C. 20549.

Extension:

Rule 30d–2, SEC File No. 270–437, OMB Control No. 3235–0494.

Notice is hereby given that, under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 30(e) of the Investment Company Act of 1940 [15 U.S.C. 80a–29(e)] (the ''Investment Company Act'' or ''Act'') and rule 30d–2[1] thereunder [17 CFR 270.30d–2] require unit investment trusts (''UITs'') that invest substantially all of their assets in securities of a management investment company (''fund'') to send a report to shareholders at least semi-annually containing financial information on the underlying fund.[2] Rule 30d–2 requires that the reports contain the financial statements that are required by rule 30d–1 [17 CFR 270.30d–1] to be included in the report of the underlying fund for the same fiscal period. Rule 30d–1 requires that the reports contain the financial statements required by a fund's registration form. Rule 30d–2, however, permits, under certain conditions, delivery of a single shareholder report to investors who share an address (''housholding'') to satisfy the delivery requirements of the rule. The purpose of the householding provisions of the rule

[1] The Commission has proposed that rule 30d–2 be redesignated as rule 30e–2. *See* Role of Independent Directors of Investment Companies. Securities Act Rel. No. 7754; Exchange Act Rel. No. 42007; Investment Company Act Rel. No. 24082 (Oct. 14, 1999) [64 FR 59826 (Nov. 3, 1999)]. The proposal has not been adopted as of the date of this notice.

[2] Management investment companies are defined in section 4(3) of the Investment Company Act as any investment company other than a face-amount certificate company or a unit investment trust, as those terms are defined in sections 4(1) and 4(2) of the Investment Company Act. *See* 15 U.S.C. 80a–4.

is to reduce the amount of duplicative reports delivered to investors sharing the same address.

Rule 30d–2 permits householding of annual and semi-annual reports by UITs to satisfy the delivery requirements of rule 30d–2 if, in addition to the other conditions set forth in the rule, the UIT has obtained from each investor written or implied consent to the householding of shareholder reports. The rule requires UITs that wish to household shareholder reports with implied consent to send a notice to each investor stating that the investors in the household will receive one report in the future unless the investors provide contrary instructions. In addition, at least once a year, UITs relying on the rule for householding must explain to investors who have provided written or implied consent how they can revoke their consent. Preparing and sending the initial notice and the annual explanation of the right to revoke are collections of information.

The rule requires UITs that invest substantially all of their assets in securities of a fraud to transmit to shareholders at least semi-annually reports containing financial statements and certain other information in order to apprise current shareholders of the operational and financial condition of the UIT. Absent the requirement to disclose all material information in reports, investors would be unable to obtain accurate information upon which to base investment decisions and consumer confidence in the securities industry might be adversely affected. Requiring the submission of these reports to the Commission permits us to verify compliance with securities law requirements.

Rule 30d–2 allows UITs to household shareholder reports if certain conditions are met. Among the conditions with which a UIT must comply are providing notice to each investor that only one report will be sent to the household and providing to each investor that consents to householding an annual explanation of the right to revoke consent to the delivery of a single shareholder report to multiple investors sharing an address. The purpose of the notice and annual explanation requirements associated with the householding provisions of the rule is to ensure that investors who wish to receive individual copies of shareholder reports are able to do so.

The Commission estimates that as of December 1999, approximately 655 UITs were subject to the provisions of rule 30d–2. The Commission further estimates that the annual burden associated with rule 30d–2 is 121 hours for each UIT, including an estimated 20 hours associated with the notice requirement for householding and an estimated 1 hour associated with the explanation of the right to revoke consent to householding, for a total of 79,255 burden hours.

The estimate of average burden hours is made solely for the purpose of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

In addition to the burden hours, the Commission estimates that the cost of contracting for outside services associated with complying with rule 30d–2 is $12,000 per respondent (80 hours times $150 per hour for independent auditor services), for a total of $7,860,000 ($12,000 per respondent times 655 respondents).

Compliance with the collection of information requirements relating to the transmittal of shareholder reports required by the rule is mandatory. Compliance with the collection of information requirements relating to the householding provisions of the rule is necessary to obtain the benefit of providing only one shareholder report to a household containing more than one investor. Responses to the collections of information will not be kept confidential. The rule does not require these reports or notices be retained for any specific period of time. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days after this notice.

Dated: December 11, 2000.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–32278 Filed 12–18–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 24789/December 12, 2000]

INVESTMENT COMPANY ACT OF 1940; Vanguard Index Funds et al.

In the Matter of; Vanguard Index Funds, The Vanguard Group, Inc., Vanguard Marketing Corporation, P.O. Box 2600, Valley Forge, PA 19482, (812–12094), Order under section 6(c) of the Investment Company Act of 1940 granting exemptions from sections 2(a)(32), 18(f)(1), 18(i), 22(d) and 24(d) of the Act and Rule 22c–1 under the Act and under sections 6(c) and 17(b) of the Act granting exemptions from sections 17(a)(1) and (2) of the Act and denying a request for hearing.

Vanguard Index Funds, The Vanguard Group, Inc. and Vanguard Marketing Corporation (collectively, ''Vanguard'') filed an application on May 12, 2000, and amended the application on July 12, 2000. Applicants requested an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for exemptions from sections 2(a)(32), 18(f)(1), 18(i), 22(d), and 24(d) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for exemptions from sections 17(a)(1) and (2) of the Act. The requested order would permit: (a) certain open-end management investment companies (''Funds'') to issue a new class of shares with limited redeemability (''VIPERS''); (b) secondary market transactions in VIPERs at negotiated prices on a national securities exchange; (c) dealers to sell VIPERs to secondary market purchasers unaccompanied by a prospectus, when prospectus delivery is not required by the Securities Act of 1933 (''Securities Act''); and (d) certain affiliated persons of the Funds to deposit securities into, and receive securities from, the Funds in connection with the purchase and redemption of aggregations of VIPERs.

On October 6, 2000, a notice of the filing of the application was issued (Investment Company Act Release No. 24680). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. On October 30, 2000, Standard & Poor's (''S&P''), a division of McGraw-Hill Companies, Inc. (''McGraw-Hill''), submitted a hearing request on the application (''Hearing Request'').

Rule 0–5(c) states that the Commission will order a hearing on a matter, upon the request of an ''interested person'' or upon its own motion, if it appears that a hearing is ''necessary or appropriate in the public interest or for the protection of

investors.'' The Commission has reviewed each of the issues raised in the Hearing Request and finds that none of the issues warrants ordering a hearing on the application. Set forth below is a summary of each of the arguments made by S&P in support of a hearing and the Commission's findings.

First, S&P states that McGraw-Hill has filed suit against Vanguard concerning the use of S&P indices and trademarks in connection with the issuance of VIPERs (''Litigation''). S&P states that it is not in the public interest for the Commission to grant the requested exemptions when Vanguard's right to issue VIPERs is being challenged in the Litigation. S&P asserts that a potentially chaotic situation could develop if S&P prevails in the Litigation after the Commission allows the issuance of VIPERs.

The Commission has determined that the Litigation is not relevant to the issues the Act requires the Commission to consider in deciding whether to grant or deny the application. The Litigation does not relate to or challenge any of the specific exemptions requested by Vanguard, nor does the Litigation assert any claims under the Act. With respect to any potential detriment that shareholders might suffer if S&P prevails in the Litigation after the issuance of VIPERs, any conclusions that the Commission might reach, even if a hearing were held, would require the Commission to speculate on the outcome of the Litigation and on the possible remedies that would be imposed.

Second, S&P states that it is not in the interests of investors for Vanguard to issue VIPERs when Vanguard appears unable to meet its obligations as set forth in the notice. Specifically, S&P asserts that Vanguard's representatives in the Litigation suggest that VIPERs are simply shares of an additional class of an existing Fund, while the representations in the application indicate that Vanguard will highlight the differences between VIPERs and traditional mutual fund investments. S&P indicates that these contradictory public positions could lead to investor confusion.

The Commission thoroughly considered the issue of potential investor confusion during the review of the application. In the application, Vanguard agrees to a variety of specific measures designed to address this issue. The Commission has determined that S&P has not raised any issue that, if substantiated, would indicate that Vanguard would not meet the obligations set forth in the application. If Vanguard were unable to meet its obligations, the Commission would take appropriate action.

Third, S&P states that it is not in the interests of investors for the Commission to facilitate an unconventional investment that may never achieve its stated purpose of encouraging short-term traders not to trade in shares of the conventional classes of the Funds. Specifically, S&P states that because Vanguard may charge an administrative fee when shareholders in a conventional class of a Fund exchange shares for VIPERs, the Vanguard proposal may not succeed in drawing short-term traders from conventional classes to exchange-traded classes. S&P also states that a hearing would be appropriate to explore why Vanguard's current and previous prospectuses do not discuss the problems that the application attributes to short-term traders.

The Commission finds that the specific issues raised by S&P are not relevant to the relief requested by Vanguard in the application. In the application, Vanguard represents that any administrative fee assessed on exchanges will comply with rule 11a-3 under the Act, which governs this type of fee. Vanguard has not requested any relief relating to the imposition of this fee. Any disclosure issues in current and prior prospectuses have been addressed previously as necessary during the disclosure review process and are not the subject of the application.

Finally, S&P questions whether the Commission should grant the requested relief from section 24(d) of the Act, which would allow dealers to sell VIPERs to secondary market purchasers unaccompanied by a prospectus, when the Securities Act does not require prospectus delivery. S&P argues that because of the risks of the Litigation and the possible effect of the Litigation on the Funds, the Commission should require Vanguard to deliver prospectuses disclosing information about the Litigation to all VIPERs investors.

The Commission fully considered issues relating to prospectus delivery relief during its review of the application. A condition to the prospectus delivery relief is that the national securities exchange that lists VIPERs will require the delivery of a product description to secondary market purchasers. As stated in the application, the product description must provide, among other things, a plain English overview of the material risks of owning the Fund's shares. The product description also must disclose the actions that would be taken if the Fund's license with S&P were terminated. In addition, the Commission understands that Vanguard intends to include a description of the Litigation in the product description that will be similar to the disclosure contained in the Fund's prospectus.

On the basis of the foregoing, the Commission finds that S&P has not articulated any material issue of fact or law that is relevant to the Commission's decision whether to grant the requested relief or that has not been considered previously.[1] It therefore appears that a hearing is not necessary or appropriate in the public interest or for the protection of investors.

Accordingly,

It Is Ordered that the request for a hearing is denied.

The matter having been considered, it is found, on the basis of the information set forth in the application, as amended, that granting the requested exemptions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

It is further found that the terms of the proposed transactions are fair and reasonable and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and the general purposes of the Act.

Accordingly,

It Is Further Ordered, that the requested exemptions under section 6(c) of the Act from sections 2(a)(32), 18(f)(1), 18(i), 22(d), and 24(d) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act from sections 17(a)(1) and (2), are granted, effective immediately, subject to the conditions contained in the application, as amended.

The exemption from section 24(d) of the Act does not affect a purchaser's rights under the civil liability and anti-fraud provisions of the Securities Act. Thus, rights under section 11 and section 12(a)(2) of the Securities Act extend to all purchasers who can trace their securities to a registration statement filed with the Commission, regardless of whether they were delivered a prospectus in connection with their purchase.

[1] The Commission does not deem it necessary to make a formal determination with respect to the status of S&P as an ''interested person'' within the meaning of section 40(a) of the Act and rule 0–5(c) under the Act inasmuch as the Commission has determined that the assertions made and the issues raised in connection with the application do not warrant a hearing.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–32208 Filed 12–18–00; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

[Public Notice 3512]

Bureau of Nonproliferation; Determination Under the Arms Export Control Act

AGENCY: Department of State.

ACTION: Notice.

Pursuant to section 654(c) of the Foreign Assistance Act of 1961, as amended, notice is hereby given that the Department of State has made a determination pursuant to Section 73 of the Arms Export Control Act. The Department has concluded that publication of the determination would be harmful to the national security of the United States.

Dated: December 4, 2000.

Robert J. Einhorn,

Assistant Secretary of State for Nonproliferation.

[FR Doc. 00–32311 Filed 12–18–00; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 3513]

Bureau of Nonproliferation; Imposition of Missile Proliferation Sanctions Against Entities in Iran

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made that entities in Iran have engaged in missile technology proliferation activities that require imposition of sanctions pursuant to the Arms Export Control Act, as amended, and the Export Administration Act of 1979, as amended (as carried out under Executive Order 12924 of August 19, 1994).

EFFECTIVE DATE: November 17, 2000.

FOR FURTHER INFORMATION CONTACT: Vann H. Van Diepen, Office of Chemical, Biological and Missile Nonproliferation, Bureau of Nonproliferation, Department of State (202–647–1142).

SUPPLEMENTARY INFORMATION: Pursuant to section 73(a)(1) of the Arms Export Control Act (22 U.S.C. 2797b(a)(1)); section 11B(b)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2401b(b)(1)), as carried out under Executive Order 12924 of August 19, 1994 (hereinafter cited as the ''Export Administration Act of 1979''); and Executive Order 12851 of June 11, 1993; a determination was made on November 17, 2000, that the following foreign persons have engaged in missile technology proliferation activities that require the imposition of the sanctions described in section 73(a)(2)(B) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(B)) and Section 11B(b)(1)(B)(ii) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(ii) on the following entities:

1. Shahid Hemmat Industrial Group (SHIG) (Iran) and its sub-units and successors; and

2. SANAM Industrial Group (Iran) and its sub-units and successors.

Accordingly, the following sanctions are being imposed on these entities:

(A) new individual licenses for exports to the entities described above of items controlled pursuant to the Export Administration Act of 1979 will be denied for two years;

(B) new licenses for export to the entities described above of items controlled pursuant to the Arms Export Control Act will be denied for two years; and

(C) no new United States Government contracts involving the entities described above will be entered into for two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanction only applies to exports made pursuant to individual export licenses.

These measures shall be implemented by the responsible agencies as provided in Executive Order 12851 of June 11, 1993.

Dated: December 4, 2000.

Robert J. Einhorn,

Assistant Secretary of State for Nonproliferation.

[FR Doc. 00–32312 Filed 12–18–00; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 3514]

Bureau of Nonproliferation; Lifting of Nonproliferation Measures Against Two Russian Entities

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made, pursuant to section 6 of Executive Order 12938 of November 14, 1994, as amended by Executive Order 13094 of July 28, 1998, to remove nonproliferation measures on two Russian entities.

EFFECTIVE DATE: November 17, 2000.

FOR FURTHER INFORMATION CONTACT: On general issues: Vann H. Van Diepen, Office of Chemical, Biological and Missile Nonproliferation, Bureau of Nonproliferation, Department of State, (202–647–1142). On import ban issues: Office of Foreign Assets Control, Department of the Treasury, (202–622–2500). On U.S. Government procurement ban issues: Gladys Gines, Office of the Procurement Executive, Department of State, (703–516–1691).

SUPPLEMENTARY INFORMATION: Pursuant to the authorities vested in the President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (''IEEPA''), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Arms Export Control Act (22 U.S.C. 2751 *et seq.*), and section 301 of title 3, United States Code, and Section 6 of Executive Order 12938 of November 14, 1994, as amended, a determination was made on November 17, 2000, that it is in the foreign policy and national security interests of the United States to remove the restrictions imposed July 30, 1998, on the following Russian entities, their sub-units and successors, pursuant to Sections 4(b), 4(c), and 4(d) of the Executive Order: INOR Scientific Institute; and Polyus Scientific Production Association.

Dated: December 4, 2000.

Robert J. Einhorn,

Assistant Secretary of State for Nonproliferation.

[FR Doc. 00–32313 Filed 12–18–00; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice Number 3495]

United States International Telecommunication Advisory Committee (ITAC)—Telecommunication Standardization Sector (ITAC–T); National Committee and U.S. Study Groups A, B, and D; Notice of Meetings

The Department of State announces meetings of the U.S. International Telecommunication Advisory Committee (ITAC), ITAC—Telecommunication Standardization (ITAC–T) National Committee, and U.S. Study Groups A, B, and D. The purpose of the Committees is to advise the Department on policy and technical issues with respect to the International

Telecommunication Union and international telecommunication standardization and development. Except where noted, meetings will be held at the Department of State, 2201 ''C'' Street, NW., Washington, DC.

The ITAC will meet on December 20, 2000, from 9:30 to noon to prepare for the World Telecommunication Policy Forum on Internet Telephony in Department of State room 1406 and from 1:30 to 4:30 to prepare for the next meeting on ITU Reform in Department of State room 1207.

The ITAC–T National Committee will meet January 10, 2001 from 9:30 to noon and February 28, 2001 from 9:30 to 3:30 at the offices of the Telecommunication Industry Association, 2500 Wilson Boulevard, Arlington, VA 22201. The ITAC–T National Committee will meet February 14, 2001 from 9:30 to 3:30 at the offices of the Alliance for Telecommunications Industry Solutions, 1200 G Street, NW., Washington, DC 20005. The agenda for all three meetings will be preparations for the ITU–T Telecommunication Standardization Advisory Group meeting starting on March 19, 2001.

The ITAC–T U.S. Study Group A will meet from 9:30 to noon on January 4, 2001, to prepare positions for the ITU–T Study Group 2 meeting starting in January 23, 2001.

The ITAC–T U.S. Study Group B will meet from 9:00 am to 4:30 on January 19, 2001, at the Wyndham Anatole Hotel, 2201 Stemmons Freeway, Dallas, TX 75207 to prepare positions for the next ITU–T Study Group 15 meeting, February 5–9, 2001.

Members of the general public may attend these meetings. Directions to meeting locations and actual room assignments may be determined by calling the Secretariat at 202–647–0965/2592. For meetings held at the Department of State: entrance to the building is controlled; people intending to attend any of the ITAC meetings should send a fax to (202) 647–7407 not later than 24 hours before the meeting for preclearance. This fax should display the name of the meeting (ITAC T, U.S. Study Group) and date of meeting, your name, social security number, date of birth, and organizational affiliation. One of the following valid photo identifications will be required for admission: U.S. driver's license, passport, U.S. Government identification card. Enter the Department of State from the C Street Lobby; in view of escorting requirements, non-Government attendees should plan to arrive not less than 15 minutes before the meeting begins.

Attendees may join in the discussions, subject to the instructions of the Chair. Admission of members will be limited to seating available.

Dated: December 9, 2000.

Marian Gordon,

Chairman, ITAC–T, U.S. Department of State.

[FR Doc. 00–32310 Filed 12–18–00; 8:45 am]

BILLING CODE 4710–45–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Council on Environmental Quality

Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements

AGENCY: Office of the United States Trade Representative and Council on Environmental Quality.

ACTION: Guidelines for implementation of Executive order 13141–environmental review of trade agreements: final.

SUMMARY: On November 16, 1999, President Clinton signed Executive Order 13141. 64 FR 63169 (Nov. 18, 1999). The Order makes explicit the United States' commitment to a policy of careful assessment and consideration of the environmental impacts of trade agreements, including, in certain instances, written environmental reviews. The Order directs the Office of the United States Trade Representative (USTR) and the Council on Environmental Quality (CEQ) to oversee implementation of the Order, including the development of procedures pursuant to the Order.

The procedures called for by the Executive Order (the Guidelines) are published below. USTR and CEQ developed the Guidelines through an extensive public process and consultations with appropriate foreign policy, environmental, and economic agencies and Congress. USTR and CEQ have carefully taken public views into account in finalizing the Guidelines, and the final Guidelines endeavor to reflect many of them.

FOR FURTHER INFORMATION CONTACT: Office of the U.S. Trade Representative, Environment and Natural Resources Section, telephone 202–395–7320, or Council on Environmental Quality, telephone 202–456–6224.

SUPPLEMENTARY INFORMATION:

A. Background

Executive Order 13141 builds on U.S. experience with written environmental reviews of previous trade agreements, including the North American Free Trade Agreement (1991–92 and 1993), the Uruguay Round Agreements (1994), and the proposed Accelerated Tariff Liberalization initiative with respect to forest products (1999). The Order institutionalizes the use of environmental reviews as an important tool to help identify potential positive and negative environmental effects of certain major trade agreements, and to facilitate consideration of appropriate responses where effects are identified. Pursuant to the Order, environmental reviews, along with a process of ongoing assessment and evaluation, should help shape trade agreements that contribute to the broader goal of sustainable development. The Order is available on USTR's internet web site at www.ustr.gov.

USTR and CEQ developed the Guidelines called for by the Order in consultation with interested agencies on the Trade Policy Staff Committee (TPSC), including the Departments of Agriculture, Commerce, Energy, Interior, Justice, State, Treasury and Transportation, the U.S. Environmental Protection Agency, and the U.S. Agency for International Development. The TPSC, established under section 242 of the Trade Expansion Act of 1962, as amended (19 U.S.C. section 1872), is the principal staff-level mechanism for interagency decisionmaking on U.S. trade policy. The current participants in the TPSC process for purposes of the Guidelines include agencies with relevant environmental, economic and foreign policy expertise. *See* Guidelines, Appendix A.[1]

As part of the process for developing the Guidelines, USTR and CEQ sought to involve interested members of the public at significant stages. At the outset, USTR and CEQ requested public comment concerning issues the agencies should consider in developing the guidelines, and received twenty-two sets of written comments. 65 FR 9757 (Feb. 22, 2000). USTR and CEQ also requested comment on draft guidelines published in July, 2000, and received twenty-five sets of written comments. 65 FR 42,743 (July 11, 2000). Eight individuals and organizations presented testimony with regard to the draft guidelines at the August 2 public hearing. All written comments and a

[1] The basic work of the TPSC is performed by a network of staff-level subcommittees and task forces, organized by geographical region and/or sector. The committees prepare recommendations on subjects within the purview (*e.g.,* instructions to negotiators on specific issues relevant to a given trade agreement). These recommendations take the form of a paper, which must then be cleared by agencies on the TPSC.

transcript of the hearing are available for public inspection in USTR's reading room located at 600 17th Street NW., Washington, DC 20508.

USTR and CEQ also consulted extensively with the Trade and Environmental Policy Advisory Committee (TEPAC), as well as other interested advisory committees. TEPAC is part of the trade advisory committee system established by Congress to provide private sector information and advice on the priorities and direction of U.S. trade policy. TEPAC sponsored several workshops on the Guidelines for TEPAC members and other participants, which were open to the public. USTR, CEQ, and other interested agencies participated in the public workshops. TEPAC also submitted a divided recommendation prior to publication of the draft Guidelines, and USTR and CEQ consulted informally with interested TEPAC members throughout the development of the Guidelines.

In addition, USTR and CEQ drew upon agencies' experience gained to date in implementing the Executive Order in the review of the Jordan Free Trade Agreement negotiations, *see* 65 FR 58,342 (September 28, 2000), and in planning for the review of the Free Trade Area of the Americas negotiations. *See* 65 FR 75,763 (Dec. 4, 2000).

B. Public Comments

The views of the public played a significant role in shaping the final Guidelines. USTR and CEQ benefitted from numerous constructive comments provided by the public in written comments and at the August 2, 2000 hearing. Public views reflected many different perspectives, including those of environmental organizations, industry, and agriculture.

Public comments generally supported the overall goals of the Executive Order and Guidelines, and noted that the draft Guidelines represented a significant step forward toward achieving those goals. However, a number of commenters expressed concern that the draft Guidelines were insufficiently specific concerning how environmental considerations would actually be integrated into the development of U.S. trade negotiating objectives. Some of these commenters also advocated more robust consideration of alternatives than provided for in the draft Guidelines. Some commenters also favored more explicit provision for engaging the public early in the negotiating process to allow for a meaningful public role in shaping overall trade objectives and negotiating positions. In particular, these commenters emphasized that early public engagement would assist in identifying ''win-win'' opportunities where the opening of markets and reduction or elimination of subsidies may yield environmental benefits.

From another perspective, other commenters were concerned that the process outlined in the draft Guidelines was too prescriptive and inflexible, and could thus hamper trade negotiators. A number of commenters emphasized the need to ensure that reviews would be based on an objective, impartial analysis of environmental effects and sound scientific principles. They requested that the final Guidelines clarify that positive as well as negative impacts would be considered, and stressed that all government agencies with relevant expertise and all interested advisory committees should be involved in the reviews.

Commenters differed concerning the degree to which reviews should address global and transboundary environmental impacts. Several commenters favored creating a presumption in favor of reviewing such effects, while others argued that the reviews should normally be limited to impacts within the United States.

Several commenters requested that the final Guidelines provide for greater transparency in the negotiation process, including the release of draft negotiating texts. While acknowledging that confidentiality for some aspects of the negotiation might be appropriate, these commenters argued that non-disclosure should be kept to a minimum, and that cleared advisors should be used where confidentiality was unavoidable.

Concerning agency roles, a number of commenters contended that CEQ and environmental agencies should have a more prominent role in conducting the reviews, while others argued that their role should be less prominent. Several commenters criticized the way in which governmental resource constraints were reflected in the draft Guidelines and urged that reviews should not be conditioned on the availability of resources.

Finally, several commenters pointed out that the draft Guidelines omitted reference to possible implications of trade agreements for state and local (as well as federal) environmental regulatory authorities.

C. Principal Revisions to the Draft Guidelines

The final Guidelines have strengthened and clarified provisions pertaining to early and proactive integration of environmental and trade policy objectives. Specifically, Sections I and II of the Guidelines expressly acknowledge that the written environmental review process is not the sole means of integrating environmental concerns and goals into a proposed trade agreement, and make clear that public input will be sought even where no written environmental review is conducted (Section II.7). The final Guidelines also clarify that informal public outreach and consultations shall take place at an early stage in the review process, and that information received at this stage will be used to inform the development of U.S. negotiating objectives and positions (Section III, A and B).

The final Guidelines provide further clarification that reviews will consider positive as well as negative potential impacts of trade agreements (*see, e.g.,* Section IV.B.2, and Appendix C) and that analysis will be objective and scientific (Section V.A.2). Objectivity and balance in the reviews are further advanced through the active involvement of a broad range of government agencies (Section VIII.A.5) and relevant advisory committees (*see, e.g.,* sections VI.6 and IV.4). The final Guidelines also provide clarifications regarding possible state, local, and tribal governmental regulatory issues (Sections IV.B.2.b, V.B.1 and appendix C).

The final Guidelines make explicit (in a new Section IV.C) that the extent of the analysis shall be proportionate to the significance of anticipated environmental impacts. Where initial steps in the review process indicate that environmental impacts are likely to be *de minimis,* it will normally be appropriate to abbreviate the analysis.

Concerning global and transboundary impacts, the final Guidelines provide some additional clarification to ensure that potential global and transboundary impacts are appropriately identified in the scoping process (Section V.B.5). However, the general approach of the draft Guidelines has been retained in conformity with the Executive Order, which provides that the focus of the review should be on impacts in the United States, and examination of global and transboundary impacts may be included as appropriate and prudent.

The final Guidelines include a new provision concerning transparency and confidentiality in the review process (Section VI.6). This is a difficult and complex issue, which has implications beyond the scope of the Order and the Guidelines. The United States believes that transparency and openness are vital to ensuring public understanding and support for international trade policy, and is at the forefront of efforts to improve transparency in the world

trading system. The United States is also committed to keeping the public informed about trade negotiations and engaging in regular dialogue with interested stakeholders. However, disclosure of certain information to foreign governments could compromise the ability of trade negotiators to obtain the best outcome for national interest. Therefore, it is important to maintain a degree of confidentiality concerning development of U.S. negotiating objectives and positions and the conduct of negotiations.

The final Guidelines endeavor to strike a balance between these goals. They state that sufficient information shall be provided to the public to facilitate understanding and involvement in a meaningful manner concerning U.S. negotiating objectives and the environmental review process. However, to the extent that disclosure would impair the United States' ability to develop negotiating objectives or conduct negotiations, or would compromise proprietary or confidential information, issues shall be addressed, where appropriate, through the advisory committee system of cleared advisors.

The final Guidelines make clear that CEQ and USTR shall jointly oversee the implementation of the Executive Order, including the Guidelines, and consult at the outset of each review (Section VIII.A.1, 5). The final Guidelines also modify references to the role of governmental resources (for example, the specific reference to resources in connection with consideration of global and transboundary effects is deleted, see Section V.B.5). However, because adequate resources are critical to the effective implementation of the Order and Guidelines, several provisions address the resource issue (Sections II.5, VIII.A.2 and 6). Additional language clarifies that agencies shall seek adequate resources to carry out their responsibilities within their planning budgets (Section VIII.A.6).

Finally, the Guidelines are intended to be a living document. CEQ and USTR retain the ability to revise the Guidelines, in consultation with other agencies, advisory committees and the public, as experience is gained with applying them to particular reviews (Section VIII.B.1). If CEQ and USTR conclude that revision is appropriate, the public shall be notified of the intent to revise and be given an opportunity to comment on significant revisions.

Carmen Suro-Bredie,

Chair, Trade Policy Staff Committee, Office of the U.S. Trade Representative.

Dinah Bear,

General Counsel, Council on Environmental Quality.

Guidelines for Implementation of Executive Order 13141 Council on Environmental Quality and the United States Trade Representative

I. Purpose of the Guidelines

1. The Council on Environmental Quality (CEQ) and the United States Trade Representative (USTR) issue these Guidelines pursuant to Executive Order 13141, Environmental Review of Trade Agreements (the Order). The purpose of the Guidelines is to implement the Order so as to ensure that consideration of reasonably foreseeable environmental impacts of trade agreements (both positive and negative), and identification of complementarities between trade and environmental objectives, are consistent and integral parts of the policymaking process.

2. The primary focus of the Order and these Guidelines is on the process for evaluating the environmental implications of certain major proposed trade agreements, which will be the subject of written environmental reviews (ERs). In addition, as recognized by the Order, the broader goal of sustainable development shall also be advanced through an ongoing process of assessment, evaluation and public consultation by responsible Federal agencies, even where no ER is conducted.

II. Environmental Review of Trade Agreements

1. Section 4(a) of the Order identifies three categories of agreements for which an ER is mandated in light of their potential for significant environmental impacts: (1) comprehensive multilateral trade rounds; (2) bilateral or plurilateral free trade agreements; and (3) major new trade liberalization agreements in natural resource sectors.

2. Section 4(b) of the Order provides that agreements reached in connection with enforcement and dispute resolution actions are not covered by the Order.

3. Section 4(c) of the Order provides that ERs may also be warranted for other agreements. A decision to initiate the ER process for a Section 4(c) agreement shall be based on objective criteria.

4. The significance of reasonably foreseeable environmental impacts shall be an essential factor in determining whether to conduct an ER for a section 4(c) agreement. The assessment of this factor shall include consideration of the following criteria:

a. The extent to which the agreement might affect environmentally sensitive media and resources and/or result in substantial changes in trade flows of products or services that could confer environmental harms or benefits;

b. The extent to which the agreement might affect U.S. environmental laws, regulations, policies, and/or international commitments;

c. The magnitude and scope of reasonably foreseeable environmental impacts; and

d. The magnitude of anticipated changes in trade flows.

5. In certain circumstances, additional factors, such as negotiation timetables and the availability of relevant data, analytical tools and expertise, may be considered in decisions regarding section 4(c) agreements.

6. The Order anticipates that most sectoral liberalization agreements will not require an ER because it is expected that they are unlikely to result in significant environmental impacts.

7. A decision not to conduct an ER for a Section 4(c) agreement will not relieve the Federal government of the obligation to consider environmental issues under the process of ongoing consultations, assessment and evaluation applicable to the negotiation of all trade agreements. As part of that process, USTR shall facilitate identification of any relevant environmental issues by providing opportunities for engaging the public, as well as through the early initiation of the Trade Policy Staff Committee (TPSC) process.[1]

8. The decision not to conduct an ER for a Section 4(c) agreement may be reassessed as appropriate.

III. Initiation of the Environmental Review Process

A. General Principles

1. The overarching goal of the ER process is to ensure that, through the consistent application of principles and procedures, environmental considerations are integrated into the development of U.S. trade negotiating objectives and positions. The process is intended to provide timely information

[1] The Trade Policy Staff Committee (TPSC), established under section 242 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. section 1872, is the principal staff-level mechanism for interagency decisionmaking on U.S. trade policy. The current participants in the TPSC process with respect to the implementation of these Guidelines include all agencies with relevant environmental, economic and foreign policy expertise. *See* Appendix A.

that will enable trade policymakers and negotiators to understand the environmental implications of possible courses of action.

2. The goals of the ER process shall be achieved through a variety of formal and informal means, flexible enough to accommodate the different types of trade agreements and negotiating timetables. Early in the negotiating process, public views on the broad objectives of the proposed agreement shall be sought through informal public outreach and consultation. As more is known about the shape of the proposed agreement, the process shall become more formal and analytical, leading to the issuance of the written ER documents.

3. Pursuant to Section 5 of the Order, while an ER shall be undertaken sufficiently early in the negotiating process to inform the development of negotiating positions, it shall not be a condition for the timely tabling of specific negotiating positions.

B. Early Outreach and Consultations

1. When negotiation of the prospective trade agreement is first under consideration, USTR, through the TPSC, shall seek information regarding potential environmental concerns and benefits associated with the commercial practices and trade policies under consideration. This shall be accomplished through an ongoing, flexible process of consultation with Congress, the interested public, and advisory committees, and, in the normal case, **Federal Register** notice(s) requesting public comment on environmental issues and other issues concerning the negotiations. *See* Appendix B.

2. By virtue of their relevant expertise, TPSC agencies play an important role in the development of trade policies and objectives. Accordingly, throughout the ER process they shall provide analytical expertise and shall bring important environmental issues to the attention of the relevant TPSC subcommittee(s) in a timely manner.

3. The environmental information developed in this early stage shall inform the development of U.S. negotiating objectives and positions.

C. Initiating the Written Environmental Review

1. USTR, through the TPSC, shall initiate the formal written ER process with a notice in the **Federal Register** as soon as possible once sufficient information exists concerning the scope of the proposed trade agreement, allowing for the meaningful evaluation of its potential environmental ramifications. *See* Appendix B.

2. Environmental issues shall be analyzed by the relevant TPSC subcommittee(s) or, as appropriate, by a working group under the subcommittee(s). For purposes of these Guidelines, the term Environmental Review Group (ERG) refers to any TPSC group tasked with the environmental review of trade agreements under these Guidelines.

3. In order to expedite the initiation of the ER process for a particular trade agreement, it may be desirable to analyze discrete aspects of the proposed agreement as sufficient information becomes available. In all cases, the final ER document should address identified environmental issues in a comprehensive manner.

4. For some agreements that fall under Section 4(c) of the Executive Order, the need for an ER may not be identified until after specific negotiating positions have been established or are under development. In such cases, the ER process shall be initiated as soon as feasible thereafter.

IV. Determining the Scope of the Environmental Review

A. General Principles

1. The scoping process involves the identification of significant issues to be analyzed in depth in the written ER, along with the elimination from detailed study of those issues which are not significant or have been covered by prior reviews.

2. The early involvement of agencies with relevant expertise and the public in the scoping process helps assure that analysis is adequate and that issues are identified in a timely manner.

3. Scoping includes consideration of the environmental dimensions of the commercial practices and trade policies at issue, including ways in which the potential trade agreement can complement U.S. environmental objectives.

4. USTR, through the TPSC, shall request public comment on the scope of the ER through the **Federal Register** Notice of Intent to Initiate Environmental Review, and shall seek the views of interested advisory committees, including the Trade and Environment Policy Advisory Committee (TEPAC). *See* Section VI and Appendix B.

B. The Scoping Process

1. Overview

a. The scoping process for the ER has two principal components: (i) identification of issues; and (ii) selection and prioritization of issues for review. The first component focuses on soliciting input and determining the types of environmental impacts that could result from the proposed trade agreement. The second component focuses on selecting and prioritizing the significant issues that should be analyzed to determine the environmental consequences of the trade agreement, if any. The result of an effective scoping process is a targeted, analytical work plan.

b. Issue identification and prioritization is an iterative process. Negotiating positions are likely to undergo continual adjustment until the agreement is completed. The steps taken to establish the scope of the ER may, therefore, be revisited throughout the negotiations.

2. Identification of Issues

a. This step in the scoping process is meant to identify the range of possible environmental impacts (both positive and negative) associated with the trade agreement under consideration. However, not all issues identified will necessarily be analyzed in the ER. The second step in the scoping process, issue selection and prioritization (described below), will be used to select important issues warranting further analysis.

b. Solicitation of Information

(1) The scoping process shall draw upon the knowledge of any agency with relevant expertise in the subject matter under consideration, as well as the views of Congress, the public, and advisory committees.

(2) Where matters affecting state, local and tribal government regulatory authority may be at issue, USTR shall consult with the Intergovernmental Policy Advisory Committee (IGPAC) and other appropriate sources of information.

3. Information Relevant to Scoping

a. Three types of information shall be considered when determining the scope of the ER:

(1) the scope and objectives of the proposed trade agreement;

(2) a realistic range of alternative approaches for accomplishing the broad objectives of the trade agreement; and

(3) types of reasonably foreseeable environmental impacts.

b. Ascertaining the Scope of the Proposed Trade Agreement

(1) The scope of the ER is a function of the scope and objectives of the proposed trade agreement and the range of realistic approaches for achieving those objectives. Thus, there should be a close and interactive relationship

between the ERG and the TPSC subcommittee(s) responsible for the negotiation.

(2) The ERG shall maintain continuing awareness of U.S. negotiating goals as they evolve and ensure that the scope of the ER properly reflects emerging environmental issues.

c. Ascertaining Options for Analysis

(1) Scoping shall be used to assist in identifying possible alternative negotiating approaches and options for accomplishing the broad objectives of the trade agreement, including approaches for achieving environmental benefits. Options may also include consideration of methods for addressing positive and negative environmental impacts.

(2) The scoping process shall be used to gain an understanding of options or approaches reflecting a realistic range of possible negotiating outcomes. However, the options analyzed during the ER process shall not constrain trade negotiators from considering others.

d. Ascertaining Reasonably Foreseeable Environmental Impacts

(1) During the initial stages of scoping, a range of reasonably foreseeable environmental impacts (both positive and negative) should be considered for inclusion in the ER. *See* Appendix C. Later, as scoping progresses, some of the identified impacts may be eliminated from consideration through the process of prioritization and analysis described below.

(2) Domestic impacts are necessarily the primary concern and priority for an ER conducted under the Executive Order and these Guidelines. However, the scoping process shall also consider, pursuant to Section IV.B.5, whether it is appropriate and prudent to examine global and transboundary impacts.

(3) Consistent with existing legal requirements, the ERG may consult with academic, federal, state or local entities, and/or other interested groups that have relevant experience with economic and environmental analyses and modeling techniques.

4. Selection and Prioritization of Issues and Considerations for Establishing Scope

a. Once environmental issues have been sufficiently identified, the ERG shall select and prioritize the issues and establish the scope of the ER.

b. Considerations for establishing ER scope include:

(1) the perceived significance of potential environmental impacts;

(2) the relative importance placed on a particular issue by governmental agencies, the public, and/or advisory committees;

(3) availability of analytical tools capable of assessing environmental impacts at an adequate level of detail;

(4) existence of opportunities for building on, or incorporating by reference, work already performed or being performed elsewhere in the interagency process, so that the ER is not duplicative of other efforts.

5. Special Considerations for the Scoping of Global and Transboundary Impacts

(1) The scoping process for every ER shall be used to identify whether reasonably foreseeable global and transboundary impacts might be associated with the proposed trade agreement.

(2) Evaluation of whether it is appropriate and prudent to analyze global and transboundary impacts in the ER shall include consideration of the following:

(a) scope and magnitude of reasonably foreseeable global and transboundary impacts;

(b) implications for U.S. interests, including international commitments and programs for international cooperation;

(c) availability of relevant data and analytic tools for addressing impacts outside the United States, including reviews performed by other countries involved in negotiations or by regional or international organizations; and

(d) diplomatic considerations.

C. Outcome of the Scoping Process

1. Once the scoping process has identified and prioritized significant issues that warrant further analysis, the ERG shall plan how to proceed, taking into account that the analysis should be proportionate to the significance of anticipated impacts. Where initial steps in the ER process indicate that environmental impacts are likely to be *de minimis,* it will normally be appropriate to abbreviate the analysis.

V. Analytical Content of the Review

A. General Principles

1. Since trade agreements exhibit broad variation, it is likely that each ER will incorporate uniquely tailored analytical approaches. A different mix of analytical methodologies may be needed for different types of trade agreements.

2. The analysis shall entail an objective, rigorous assessment of the environmental issues under consideration, and shall be based on scientific information and principles, documented experience and objective data. Analysis shall normally be both qualitative and quantitative. The analytical process should take into consideration assumptions and/or uncertainty in the data and methodologies and document limitations due to those assumptions or uncertainties.

3. Agencies shall use best efforts to identify sources of data and analytical methodologies available within and outside of the U.S. government, which would then provide a foundation for subsequent specific environmental reviews. A list of such sources shall be created and made available to the public. The list may be updated over time, including on the basis of public comments.

B. Analysis of Implications for Environmental Laws and Regulations

1. The ER shall examine the extent to which the proposed trade agreement may have implications for U.S. environmental regulations, statutes and other obligations and instruments. The ER should also analyze, as appropriate, any implications that the agreement may have regarding the ability of state, local, and tribal authorities to regulate with respect to environmental matters.

2. Examples of possible regulatory implications include impacts on the ability to maintain, strengthen and enforce laws, regulations and policies on pollution control; control of toxic and hazardous wastes and materials; protection of natural resources, wildlife and endangered species; relevant product standards; control and regulation of pesticides; food safety; and the public's ability to obtain information regarding the environment.

C. Analysis of Economically Driven Environmental Impacts

1. The ER shall examine the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the trade agreement. *See* Appendix C.

2. Application of modeling techniques may provide a useful approach for estimating such environmental impacts. However, modeling and other economic analytical techniques, in and of themselves, are unlikely to provide an exclusive means for assessing areas of environmental concern. For example, prevailing tools for assessing the economic effect of comprehensive trade agreements rely on aggregation of resource sectors to estimate broad trends, while estimates of environmental impact generally benefit from a more local or regional analysis.

3. Environmental impacts shall be analyzed in comparison to a base or baseline scenario. A baseline comparison shall take into account those changes that are likely to occur in the economy and the environment even in the absence of the proposed trade agreement.

D. Identifying Ways To Address Environmental Impacts

1. Key findings and supporting analysis of the ER shall be made widely available to trade negotiators of the proposed agreement, as well as to trade and environmental policymakers throughout the government.

2. Where significant regulatory and/or economically driven environmental impacts have been identified, there shall be an analysis of options to mitigate negative impacts and create or enhance positive impacts. Options may include changes to negotiating positions as well as environmental policy responses outside the trade agreement, such as seeking possible changes to relevant U.S. domestic and international environmental policies.

3. Where options that address identified impacts are described in the ER document, they may include options for post-agreement actions for agencies to consider, such as actions to assess the accuracy of the analysis.

VI. Public Participation

1. Provision for public participation in the review and assessment of environmental impacts of trade agreements is an essential component of these Guidelines, and is meant to ensure that the public and the government benefit from an open and inclusive process of trade policy development.

2. In addition to the public, advisory committees and Congress shall regularly be consulted.

3. Procedures for public participation should be flexible, not excessively burdensome, and responsive to needs for expedited action and confidentiality. The period for public comment shall normally be forty-five days, unless a shorter or longer period is appropriate.

4. Requests for public comment shall be far enough in advance of critical junctures in the negotiation so that, to the extent practicable, the public has a reasonable opportunity to prepare and submit comments to be taken into account during the ER process. Appendix B provides guidance on the types and content of public notification and participation.

5. Public hearings, notices in relevant publications, website postings, and other mechanisms shall be employed as appropriate and feasible. When the negotiating timetable permits, a public hearing or hearings shall normally be conducted.

6. Consistent with the United States' commitment to transparency and openness in the conduct of trade negotiations, sufficient information shall be provided to the public to facilitate understanding and involvement in a meaningful manner concerning U.S. negotiating objectives and the ER process. To the extent that such disclosure would impair the United States' ability to develop negotiating objectives or conduct negotiations, or would compromise proprietary or confidential information, issues shall be addressed, where appropriate, through the advisory committee system of cleared advisors.

VII. Documentation of the Environmental Review Process

A. General Principles

1. Documentation is important for memorializing the ER process and explaining the rationale for the conclusions reached. Documentation also provides opportunities for integrating environmental considerations into negotiating positions. To that end, the Draft ER document, along with public comments, shall serve as one key means of informing the negotiation process.

2. In addition to informing the public, Final ER documents should serve as points of reference for subsequent ERs so that lessons can be learned and information drawn from the effort.

3. In order to factor environmental considerations into the development of trade negotiations, relevant steps and work products in the ER process should be undertaken sufficiently early to be of benefit to U.S. trade negotiators in developing negotiating positions.

4. Confidentiality concerns shall be taken into account when developing the Draft and Final ER documents and preparing them for public release.

B. The Environmental Review Documents

1. Consistency in the ER process, to the extent feasible given the variations in trade agreements, should be reflected through a consistent documentation format and content. Appendix D provides information on the structure and content that shall normally be followed for Draft and Final ER documents.

2. All ER documents shall be written in plain language and shall provide the rationale for the scope of the review and the selected methodology. ER documents shall also include a summary of key points raised in public comments.

3. A Draft ER document shall normally be prepared and provided to the public for comment. However, in unusual circumstances, such as when a trade agreement is to be completed under a compressed negotiating schedule, it may not be possible to produce a Draft ER document. In such cases, the Final ER document shall be issued publicly as soon as is feasible following the conclusion of the trade agreement.

4. When environmental implications that are substantially different from those analyzed in the Draft ER document emerge in the course of negotiations, an amended ER document may be prepared and made available to the public, as USTR deems appropriate through the TPSC process.

VIII. Administrative Considerations

A. Roles and Responsibilities

1. CEQ and USTR shall jointly oversee the implementation of the Executive Order, including these Guidelines.

2. Regardless of whether a written ER is mandated, USTR shall initiate the TPSC process for examining environmental issues as early as feasible in the consideration of potential trade agreements. For those agreements falling within the 4(c) category, USTR, through the TPSC, shall also determine whether an agreement warrants an ER and as part of that decision identify the resources available to perform the ER. For those agreements subject to a mandatory ER, resources available to perform the review shall be identified at the time of initiation of the ER process.

3. The decision whether to proceed with an ER shall be reflected in the TPSC paper(s) initiating negotiations. These paper(s) shall include, as appropriate, discussion of the environmental issues identified at this early stage in the TPSC process, and recommendations on how they should be addressed. Where relevant, subsequent TPSC papers shall include information regarding the findings of ERs and other environmental assessments and evaluations undertaken.

4. USTR, through the TPSC, shall conduct the ER. Environmental issues shall be analyzed by the ERG. Membership in the ERG shall be open to all interested agencies, and shall include, at a minimum, those agencies with relevant expertise in economic and environmental assessment.

5. USTR shall consult with CEQ at the outset of each environmental review. CEQ and agencies with environmental

expertise shall play a prominent role in the conduct of the reviews. Environmental agencies shall be principally responsible for providing the expertise necessary to analyze impacts on environmental media and natural resources within their areas of specialization. Similarly, the expertise of economic agencies shall be drawn upon where appropriate, and they shall be primarily responsible for identifying the economic changes likely to flow from a proposed agreement.

6. Effective implementation of the Order and Guidelines depends upon the availability of adequate resources and the full engagement of all agencies with relevant expertise. USTR, CEQ, and all Federal agencies subject to the Order shall seek adequate resources to carry out their responsibilities under the Order. Budget requests through OMB in support of these Guidelines must be written within each agency's planning guidance level. Upon request from USTR, with the concurrence of the Deputy Director for Management of the Office of Management and Budget, Federal agencies shall, to the extent permitted by law and subject to the availability of appropriations, provide analytical and financial resources and support, including the detail of appropriate personnel to USTR to carry out these Guidelines.

B. Implementation and Oversight

1. CEQ and USTR shall jointly exercise general oversight of the implementation of these Guidelines including their periodic review and update as necessary. If USTR and CEQ conclude that revision is appropriate, the public shall be notified of the intent to revise and be provided with an opportunity to comment on significant revisions.

2. These Guidelines are intended only to improve the internal management of the executive branch and do not create any right, benefit, trust or responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or any person.

Appendix A

Participants in the Trade Policy Staff Committee Process for Purposes of the Guidelines

Chair

Office of the U.S. Trade Representative

Statutory Members

U.S. Department of Agriculture
U.S. Department of Commerce
U.S. Department of Labor
U.S. Department of State
U.S. Department of the Treasury

Invited Members

Council of Economic Advisers
Council on Environmental Quality
National Economic Council/National Security Council
Office of Management and Budget
U.S. Agency for International Development
U.S. Department of Defense
U.S. Department of Energy
U.S. Department of Health and Human Services/Food and Drug Administration
U.S. Department of the Interior
U.S. Department of Justice
U.S. Department of Transportation
U.S. Environmental Protection Agency

Advisory Member

U.S. International Trade Commission

Appendix B

Public Notification and Participation Considerations

This appendix provides details on the format for particular elements of public participation described in the Guidelines. The time between key steps in the trade negotiation process will vary depending on the type and scope of the proposed agreement as well as the dynamics of the negotiation. For that reason, the precise number and timing of **Federal Register** notices and other mechanisms for public participation cannot be prescribed with specificity, and notices may be combined with **Federal Register** notices issued for other purposes (such as requests for comment on broader issues in the negotiations). **Federal Register** notices shall normally be posted on USTR's internet website.

I. Minimum Requirements for Public Participation in Environmental Review Process

A. At a minimum, the public shall be involved at the following stages of the Environmental Review Process:

1. Notice of Intent to Conduct Environmental Review
2. Notice of Intent to Initiate Environmental Review and Request for Comments on the Scope of Environmental Review
3. Notice of Availability of the Draft Environmental Review document and Request for Comments (in the normal case where a draft ER document is prepared for public comment)
4. Notice of Availability of the Final Environmental Review document

B. USTR shall also normally seek public views on environmental issues through regular consultations with Congress, advisory committees and the interested public.

II. Guidance for Particular Public Notifications

A. Notice of Intent to Conduct Environmental Review

1. USTR shall notify the public of a decision to conduct an Environmental Review of the agreement.

B. Notice of Intent to Initiate Environmental Review and Request for Comments on Scope of Environmental Review

1. The notice and request shall normally provide information on the following subjects:

a. key U.S. negotiating objectives,

b. the elements and topics expected to be under consideration for coverage by the proposed agreement,

c. the countries expected to participate in the agreement,

d. the sectors of the U.S. economy likely to be affected (if known),

e. environmental issues already identified through the TPSC process and/or public input as potentially significant.

2. It may also be appropriate to request additional comments on the scope of the environmental review as new information emerges and/or negotiating objectives shift.

C. Notice of Availability of Draft Environmental Review Document and Request for Comments

1. In the normal circumstance, where a Draft ER document is prepared for public distribution, the Draft ER document shall be made available to the public through publication of a notice of availability in the **Federal Register** and posting on the USTR website. Comments from the public will be requested.

D. Notice of Availability of Final Environmental Review Document

1. The Final ER document shall be made available to the public through publication of a notice of availability in the **Federal Register** and posting on the USTR website.

E. Availability of Public Comments

1. Public comments on environmental issues relating to the particular trade agreement and the Draft ER shall be available for public review in the USTR reading room, located at 600 17th Street NW., Washington, DC 20508.

F. Revision of Guidelines

1. USTR and CEQ, in consultation with interested agencies, may on occasion find it appropriate to revise and/or update these Guidelines. When USTR and CEQ are considering a significant revision of the Guidelines, the public shall be notified of the intent to revise and given an opportunity to comment on any significant revisions.

Appendix C

Types of Potential Environmental Impacts for Consideration

This appendix provides a list that may be useful for identifying the range of reasonably foreseeable environmental impacts arising from a proposed trade agreement. This list is illustrative and is intended to provide a general frame of reference for assisting in establishing the scope of the ER. The scope of any review must be determined on a case-by-case basis and all reasonably foreseeable environmental effects—both positive and negative—should be considered during scoping for the environmental review regardless of whether they are included on this list.

Scoping with respect to economic effects typically will be conducted through an iterative exchange between those responsible for economic analysis and those with expertise in various areas of environmental concern. Similarly, with respect to the potential effects of proposed trade disciplines on environmental laws and regulations, the scoping will typically involve an iterative exchange between those expert in the development, implementation, and interpretation of trade texts and those expert in various fields of environmental knowledge.

I. Regulatory Effects

A. Potential positive and negative implications of the proposed trade agreement for U.S. environmental regulations, statutes, and binding obligations such as multilateral environmental agreements, as well as potential implications for the ability of state, local and tribal authorities to regulate with respect to environmental matters.

B. Potential positive and negative implications of the proposed trade agreement for environmental policy instruments and other environmental commitments.

II. Economic Effects (Compared to a Base or Projected Baseline)

A. Products, processes, or sectors that may be positively or negatively affected by the proposed trade agreement, including the effects of increases or decreases in the diffusion of environmental products and technologies.

B. Changes in types or characteristics of goods and services and their distribution.

C. Changes in volume, pattern, and modes of transportation (*e.g.,* increased or decreased potential for spread of invasive species, or increased or decreased pollution impacts of transportation equipment and infrastructure).

D. Structural changes (*e.g.,* increased or decreased efficiency in natural resource use)

E. Technology effects involving changes in the process of production, including increased or decreased use of environmentally responsible technology.

III. Environmental Effects (Related to Economic Effects Identified Above)

A. Changes in level, intensity, geographic distribution and temporal scope of variables used to measure the affected environment in comparison with base values (using either base year or baseline trend as appropriate).

B. Interaction of trade-related impacts with other impacts on the relevant media or resources.

C. Environmental effects resulting from changes of standards that stem from economic effects.

IV. Increased or Decreased Impacts on Environmental Media and Resources

A. Air quality and atmosphere (including climate, ozone).

B. Fresh water quality and resources (including both surface and ground), soil retention and quality.

C. Protected or environmentally sensitive terrestrial and marine areas (*e.g.,* national parks, national wildlife refuges, wetlands, marine sanctuaries).

D. Endangered species and other species identified as significant under law (*e.g.,* certain marine mammals, migratory birds).

E. Marine, aquatic and terrestrial biodiversity, including species, genetic variety and ecosystems and the potential for invasive species to compromise such biodiversity; also ecosystem productivity and integrity, living resources and ecosystem services.

F. Environmental quality related to human health, including changes in environmental exposure to toxic substances (*e.g.,* increases or decreases in exposure to pesticide residues on food).

G. Transboundary and global impacts may include those on:

1. Places not subject to national jurisdiction or subject to shared jurisdiction, such as Antarctica, the atmosphere (including ozone and climate change features), outer space, and the high seas;

2. Migratory species, including straddling and highly migratory fish stocks and migratory mammals;

3. Impacts relating to environmental issues identified by the international community as having a global dimension and warranting a global response;

4. Transboundary impacts involving the boundaries of the United States;

5. Environmental resources and issues otherwise of concern to the United States.

Appendix D

Structure and Content of Environmental Review Documents

This appendix provides details on the structure and content of the Draft and Final environmental review documents. In certain circumstances (*e.g.,* where confidentiality is appropriate, or where there is a compressed negotiation timetable), it may be necessary to adopt a modified documentation format. However, each ER document shall normally contain the following sections:

(1) Summary
(2) Table of Contents
(3) Objectives of the Proposed Trade Agreement
(4) Scope of Review
(5) Analysis
(6) Findings and Conclusions
(7) Appendices

I. Guidance for Particular ER Document Sections

A. The *Objectives* section of the ER document should present an overview of the goals and negotiating history of the particular trade agreement under consideration. This section may highlight the perceived benefits of the agreement and related objectives for pursuing it.

B. The *Scope of Review* section should describe the principal potential environmental impacts and/or regulatory issues or types of laws and regulations identified in the scoping process. This section should not be a compendium of all potential impacts, but only those considered sufficiently important to warrant consideration for including in the ER analysis. This section of the ER document should also provide a brief presentation of the rationale employed during the issue prioritization process and the criteria used for establishing the scope of the ER and eliminating issues deemed irrelevant.

C. The *Analysis* section of the document should describe the expected beneficial and adverse impacts of those negotiating options or approaches selected for review, which should be compared to a base or baseline scenario that estimates conditions that would exist in the absence of the proposed trade agreement. The described impacts should include both beneficial and adverse impacts. This section should summarize the analytical methodology used in determining the environmental impacts, including assumptions made and uncertainties in the data and methodology (a description of the methodology may more appropriately be provided in an appendix). This section should also describe proposed options (if any) for addressing potential negative impacts and/or for enhancing benefits of the proposed trade agreement.

D. The *Conclusions* section of the document should summarize the potential environmental impacts expected from the proposed trade agreement, and may present options for addressing those impacts. This section of the document may also include discussion of any post-agreement actions when responsible agencies determine that such actions are warranted or desirable.

E. The number and nature of *Appendices* for each ER document will vary according to the nature of the trade agreement under review. In general, the use of appendices is encouraged whenever inclusion of technical and/or supporting data would improve clarity and aid in the understanding of the review process. At a minimum, a summary of key issues identified by the public during the ER process should be included as an appendix of both the Draft and Final ER documents.

[FR Doc. 00–32238 Filed 12–18–00; 8:45 am]

BILLING CODE 3190–01–U

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Desha County, Arkansas and Bolivar County, Mississippi

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed location of I–69 from US 65 in Desha County, Arkansas to State Highway 1 in Bolivar County, Mississippi, including a crossing of the Mississippi River.

FOR FURTHER INFORMATION CONTACT: Mr. Randal Looney, Environmental Specialist, Federal Highway Administration (FHWA), Federal Office Building, 700 West Capitol Avenue, Room 3130 Little Rock, Arkansas 72201–3298, Telephone: (501) 324–6430; Mr. Bill Richardson, Asst. Division Head, Environmental Division, Arkansas Highway and Transportation Department (AHTD), 10324 Interstate 30, Little Rock, Arkansas 72201–2398, Telephone: (501) 569–2379; or Mr. Claiborne Barnwell, Environmental Division Engineer, Office of Intermodal Planning, Mississippi Department of Transportation (MDOT), 401 North West Street, Jackson, Mississippi 39215–1850, Telephone: (601) 359–7920.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Arkansas Highway and Transportation Department and the Mississippi Department of Transportation will prepare an environmental impact statement (EIS) on a proposal to build a section of independent utility (SIU) for the proposed Interstate 69. The new facility would include a new roadway and bridge crossing of the Mississippi River connecting U.S. Highway 65 in Arkansas with Route 1 in Mississippi. Project distance is approximately 25 miles. Information developed by a previous EIS for the location of the Great River Bridge and other preliminary documents pertaining to the I–69 corridor will be used in this study.

Alternatives under consideration include: (1) The no build and (2) constructing a four-lane, limited access highway within the limits described above, on various alignment alternatives.

A scoping process has been initiated that involves all appropriate federal and state agencies and Native American Tribes. This will continue throughout the study as an ongoing process. A formal scoping meeting will be held for the project. A public information effort will be initiated in December, 2000, to include those agencies, local agencies, and private organizations and citizens who have previously expressed, or are known to have, interest in this proposal. This will include all coordination required under Section 106 of the Historic Preservation Act. Public informational meetings will be held in the study area to engage the regional community in the decision-making process and to obtain public input. In addition, public hearings will be held to present information developed by the environmental studies and to obtain comments and recommendations from the public. Public notice will be given concerning the time and place of informational meetings and public hearings. The Draft EIS will be made available for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and EIS should be directed to the FHWA, or AHDT, or MDOT at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: December 11, 2000.

Gary A. DalPorto,

Planning and Research Engineer, Federal Highway Administration, Little Rock, Arkansas.

[FR Doc. 00–32206 Filed 12–18–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Loudoun, Fauquier, Fairfax, Prince William, and Stafford Counties, VA

AGENCY: Federal Highway Administration, DOT.

ACTION: Notice of Intent.

SUMMARY: The Federal Highway Administration (FHWA) is issuing this notice to advise the public of its intent to prepare an Environmental Impact Statement in cooperation with the Virginia Department of Transportation (VDOT) for potential transportation improvements in the western portion of Northern Virginia, between Route 7 in Loudoun County and Interstate 95 in Stafford County, to address growing regional transportation needs.

FOR FURTHER INFORMATION CONTACT: Edward Sundra, Senior Environmental Specialist and Acting Planning and Environmental Team Manager, Federal Highway Administration, Post Office Box 10249, Richmond, Virginia 23240–0249, Telephone 804–775–3338.

SUPPLEMENTARY INFORMATION: In 1995, the Western Transportation Corridor (WTC) Major Investment Study (MIS) was initiated in accordance with 23 CFR 450.318 to develop and document a purpose and need for transportation improvements in the western portion of Northern Virginia and to identify the modal type(s) and general corridor for those transportation improvements. It was intended that the regional government would use the results of the WTC MIS for purposes of long range transportation planning. In December of 1997, that WTC MIS was completed which resulted in the identification for detailed study of a transportation system management/travel demand management alternative, a links alternative, and new facility alternatives. The WTC MIS was reopened in 1998 for additional coordination, and a Coordination Report was issued by VDOT in October of 1998. In developing the WTC MIS, VDOT studied and developed information on a variety of issues including, but not limited to, the need for transportation improvements, identification and screening of a broad range of alternatives, traffic, land use, natural resources, historic and archaeological resources, parklands, air quality, noise, hazardous materials, and cost. Additional information on the WTC MIS conducted for this project and its outcomes can be found at *http://www.vdot.state.va.us/proj/fred/wtcx.html.*

With this notice of intent, FHWA and VDOT are initiating the National Environmental Policy Act (NEPA) process for the WTC to study potential transportation improvements in the western portion of Northern Virginia between Route 7 in Loudoun County and Interstate 95 in Stafford County, just north of the City of Fredericksburg, to accommodate anticipated growth in population and employment and address increasing travel demand and regional access needs.

As part of the NEPA process, the WTC MIS purpose and need will be revisited and revised as necessary to account for any changes in regional needs or goals.

Likewise, the alternatives development and screening process from the WTC MIS will be used as a starting point for the NEPA process. Recognizing that NEPA requires the consideration of a reasonable range of alternatives that will address the purpose and need, the Environmental Impact Statement will include a range of alternatives for detailed study consisting of a no-build alternative as well as alternatives consisting of transportation system management strategies, mass transit, improvements to existing roadways, and/or new alignment facilities. These alternatives will be developed, screened, and carried forward for detailed analysis in the Draft Environmental Impact Statement based on their ability to address the purpose and need that will be developed while avoiding known and sensitive resources.

Letters describing the proposed NEPA study and soliciting input will be sent to the appropriate Federal, State and local agencies who have expressed or are known to have an interest or legal role in this proposal. It is anticipated that two formal scoping meetings will be held as part of the NEPA process, one in the Fredericksburg area and one in Northern Virginia, to facilitate local, state, and federal agency involvement and input into the project in an effort to identify all of the issues that need to be addressed in developing the Environmental Impact Statement.

Private organizations, citizens, and interest groups will also have an opportunity to provide input into the development of the Environmental Impact Statement and identify issues that should be addressed. A comprehensive public participation program will be developed to involve them in the project development process. This program will utilize the following outreach efforts to provide information and solicit input: newsletters, the Internet, a telephone hotline, e-mail, informal meetings, public information meetings, public hearings and other efforts as necessary and appropriate. Notices of public meetings or public hearings will be given through various forums providing the time and place of the meeting along with other relevant information. The draft Environmental Impact Statement will be available for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this proposed action are identified and taken into account, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action and draft Environmental Impact Statement should be directed to FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed action.)

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: December 8, 2000.

Edward S. Sundra,

Senior Environmental Specialist.

[FR Doc. 00–32294 Filed 12–18–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2000–8517]

Pacific Knight; Applicability of Ownership and Control Requirements for Fishery Endorsement

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a petition requesting MARAD to issue a determination that the ownership and control requirements of the American Fisheries Act of 1998 and 46 CFR part 356 are in conflict with an international investment agreement.

SUMMARY: The Maritime Administration (MARAD, we, our, or us) is soliciting public comments on a petition from the owners of the vessel PACIFIC KNIGHT, Official Number 561771 (Vessel), for a ruling that the requirements of MARAD's regulations at 46 CFR part 356 and the American Fisheries Act of 1998 (AFA), Title II, Division C, Pub. L. 105–277, do not apply with respect to the Vessel. The petition is submitted pursuant to 46 CFR 356.53 and section 213(g) of the AFA, which provide that the requirements of the AFA and the implementing regulations will not apply to the owners or mortgagees of a U.S.-flag vessel documented with a fishery endorsement to the extent that the provisions of the AFA conflict with an existing international agreement relating to foreign investment to which the United States is a party. This notice sets forth the provisions of the international agreement that the Petitioner alleges are in conflict with the AFA and 46 CFR part 356 and the arguments submitted by the Petitioner in support of its request. If MARAD determines that the AFA and MARAD's implementing regulations conflict with the bilateral investment treaty, the requirements of 46 CFR part 356 will be determined not to apply the Vessel to the extent of the inconsistency. Accordingly, interested parties are invited to submit their views on this petition and whether there is a conflict between the international agreement and the requirements of both the AFA and 46 CFR part 356. In addition to receiving the views of interested parties, MARAD will consult with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than January 18, 2001.

ADDRESSES: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at http://smses.dot.gov/submit. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: John T. Marquez, Jr., of the Office of Chief Counsel at (202) 366–5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR–222, 400 Seventh St., SW., Washington, DC 20590–0001 or you may send e-mail to ''John.Marquez@marad.dot.gov''.

SUPPLEMENTARY INFORMATION:

Background

The AFA, Title II, Division C, Public Law 105–277, was enacted in 1998 to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing the requirements for U.S. citizen ownership, control and financing of U.S.-flag vessels documented with a fishery endorsement. MARAD was charged with promulgating implementing regulations for fishing vessels of 100 feet or greater in registered length while the Coast Guard retains responsibility for vessels under 100 feet.

Section 202 of the AFA, raises, with some exceptions, the U.S.-Citizen ownership and control standards for U.S.-flag vessels that are documented

with a fishery endorsement and operating in U.S.-waters. The ownership and control standard was increased from the controlling interest standard (greater than 50%) of § 2(b) of Shipping Act, 1916, as amended (1916 Act), to the standard contained in § 2(c) of the 1916 Act which requires that 75 percent of the ownership and control in a vessel owning entity be vested in U.S. Citizens. In addition, § 202 of the AFA establishes new requirements to hold a preferred mortgage on a vessel with a fishery endorsement. State or federally chartered financial institutions must now comply with the controlling interest standard of § 2(b) of the 1916 Act in order to hold a preferred mortgage on a vessel with a fishery endorsement. Entities other than state or federally chartered financial institutions must either meet the 75% ownership and control requirements of § 2(c) of the 1916 Act or utilize an approved U.S.-Citizen Trustee that meets the 75% ownership and control requirements to hold the preferred mortgage for the benefit of the non-citizen lender.

Section 213(g) of the AFA provides that if the new ownership and control provisions are determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party, such provisions of the AFA shall not apply to the owner or mortgagee on October 1, 2001, with respect to the particular vessel and to the extent of the inconsistency. MARAD's regulations at 46 CFR § 356.53 set forth a process wherein owners or mortgagees may petition MARAD, with respect to a specific vessel, for a determination that the implementing regulations are in conflict with an international investment agreement. Petitions must be noticed in the **Federal Register** with a request for comments. The Chief Counsel of MARAD, in consultation with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements, will review the petitions and, absent extenuating circumstances, render a decision within 120 days of the receipt of a fully completed petition.

The Petitioners

Maruha Corporation (Maruha), its subsidiaries, Westward Seafoods, Inc. (WSI) and Westward Alaska Fisheries, Inc. (WAI), Pyramid Fishing Co. (Pyramid), and Western Alaska Investment Co. (WACO) (hereinafter collectively referred to as ''Petitioner'' or ''Petitioners'') together with Pacific Knight, LLC (Owner) have filed a petition with MARAD pursuant to 46 CFR § 356.53 for exemption from the provisions of 46 CFR part 356 for the vessel PACIFIC KNIGHT, Official Number 561771 (Vessel), on the grounds that a conflict exists between the Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, signed at Tokyo, on 2 April 1953 (the ''FCN Treaty'' or the ''Treaty''), 4 UST 2063; TIAS 2863; 206 UNTS 143, and both the AFA and 46 CFR part 356. Maruha is a Japanese Corporation. WSI and WSA are wholly owned subsidiaries of Maruha and are not considered U.S.-citizens. Both Pyramid and WACO, the members of the direct owner of the vessel, Pacific Knight, LLC, are U.S.-corporations that are indirectly owned by Maruha but that qualify as documentation citizens.

The Petitioners became the indirect owner of the Vessel when it was purchased on June 7, 1996. The Petitioner states that it was encouraged to invest in the Alaska shoreside fishing industry as part of the U.S. ''Fish and Chips'' policy. Petitioner and its subsidiaries own processing facilities in Kodiak and Dutch Harbor Alaska and are involved in a joint venture that owns a processing facility in Dutch Harbor, Alaska. Due to substantial investment in shore based processing, Petitioner states that it recognized that it needed to ensure access to sources of a steady supply of fish. In part at the urging of independent fishermen and in part due to business necessity, Petitioner maintains that it made a variety of investments in fishing vessels that deliver to its shore based facilities in Alaska.

The Vessel at issue was acquired by Petitioners and is indirectly wholly owned by Petitioners through Pacific Knight, LLC. Because the Vessel is indirectly owned by non-citizens, it would not qualify for documentation with a fishery endorsement under the new ownership and control requirements of the AFA and 46 CFR part 356. The Petitioners note, however, that the Vessel was ''grandfathered'' under the savings clause of the Anti-Reflagging Act of 1987, 46 App. U.S.C. 12102 note (1998), and thus was not required to comply with the ownership and control provisions of § 2(b) of the 1916 Act to which most vessels were subjected in order to obtain a fishery endorsement prior to the passage of the AFA . Vessels ''grandfathered'' under the savings clause of the Anti-Reflagging Act are only required to be owned by a documentation citizen in order to be eligible for documentation with a fishery endorsement. If MARAD issues a ruling that the AFA and 46 CFR part 356 do not apply to the Vessel, the Vessel must comply with the law as it existed prior to the enactment of the AFA. Therefore, the Petitioners imply that if MARAD determines that there is a conflict between the FCN Treaty and both the AFA and 46 CFR part 356, the ''grandfathered'' Vessel would only be subject to the requirement that it be owned by a documentation citizen as it was required to do prior to the enactment of the AFA.

The FCN Treaty

The entire text of the FCN Treaty is available on MARAD's internet site at *http://www.marad.dot.gov.* Following are the provisions of the Treaty that Petitioners allege are in conflict with the AFA and 46 CFR part 356.

Article V

1. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied; nor shall either Party unreasonable impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, arts and technology it needs for its economic development.

Article VI, Paragraphs 2 and 3

2. The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

3. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Article VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such

nationals and companies shall be permitted within such territories: (a) To establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

2. Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present article.

Article IX

2. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored national treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, movable property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

Petitioners' Description of the Conflict Between the FCN Treaty and 46 CFR Part 356

MARAD's regulations require at 46 CFR 356.53(b)(3) require Petitioners to submit a detailed description of how the provisions of the international investment agreement or treaty and the implementing regulations are in conflict. The remainder of this notice is the Petitioners' description of how the regulations and the FCN Treaty are in conflict. This information forms the basis on which the Petitioners request that the Chief Counsel issue a ruling that 46 CFR part 356 does not apply to Petitioners with respect to the Vessel.

''(a) Background: The Pre-AFA State of the Law and Fisheries Industry

''In 1976, Congress passed the Fishery Conservation and Management Act, Pub. L. 94–265, 90 Stat. 331 (1976). Known colloquially as the Magnuson-Stevens Act, the legislation was a comprehensive statute addressing a variety of issues related to the fisheries. Four years later, Congress amended various provisions of the Magnuson-Stevens Act when it passed the American Fisheries Promotion Act of 1980, Pub. L. 96–561, 94 Stat. 3275 (1980). The 1980 amendments instituted a policy referred to as the ''Fish and Chips'' policy, which resulted in a phase out of direct foreign fishing and fish processing. Foreign owned processing companies that wished to continue participation in U.S. fishing activity, principally activity located in the United States Exclusive Economic Zone (''EEZ'') off of Alaska, were required to invest in U.S. flag vessels or U.S. shore based processing facilities. See *generally* W. McLean & S. Sucharitkul, *Fisheries Management and Development in the EEZ: The North South and Southwest Experience,* 63 NOTRE DAME L. REV. 492 (1988). More specifically, ''Fish and Chips'' provided that the allocation of surplus fish resources to various foreign nations (including Japan) was to be based on, among other things, the extent to which a particular foreign nation entered into joint business ventures in the United States. See 16 U.S.C. § 1821(e)(1)(E)(v). These new factors were then included in the several Governing International Fishery Agreements that the United States concluded with each of the nations engaged in fishing activities in the U.S. EEZ. In particular, the United States urged Japan to contribute to the development of the then-underutilized Alaska pollock fisheries by entering into joint ventures with United States companies.

''As part of the ''Fish and Chips'' policy, half of Japan's annual fish quota allocation in the U.S. EEZ was withheld for later allocation, depending on economic cooperation. In the summer of 1982, the United States Department of State refused to allocate a substantial portion of Japan's allotment until Japan ''responded in a more positive manner to U.S. goals and agreed to more appropriate levels of joint ventures with U.S. fishermen.'' Remarks of Ambassador Theodore G. Kronmiller, U.S. Dep't of State, Seattle, Washington, Oct. 15, 1982. As a consequence of these policies and actions, Petitioners began investments in shoreside facilities in Alaska for the processing of Alaska pollock into surimi and other byproducts.

''In 1987, Congress passed the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, Pub. L. 100–239, 101 Stat. 1778 (1987) (the ''Anti-Reflagging Act''). The Anti-Reflagging Act required that United States citizens own the controlling interest, at each tier of ownership, in any entity that owns a U.S. fishing vessel. ''Controlling interest'' includes a majority of each class of stock or other equity interest in the vessel owner. Under the Anti-Reflagging Act, foreign investors were thus permitted to hold a minority (up to 49%) of the equity in a vessel-owning entity at each tier of ownership. Because the Anti-Reflagging Act permitted foreign investors to hold 49% of the equity ''at each tier of ownership,'' indirect foreign ownership could exceed 50% under the Anti-Reflagging Act. In addition, the Anti-Reflagging Act contained an ''ownership grandfather'' provision, which permitted certain fishing vessels, including Vessel, to be 100% indirectly owned by a non-citizen. See *Southeast Shipyard Ass'n* v. *United States.,* 979 F. 2d 1541 (D.C. Cir. 1992).

(b) The AFA and Section 213(g)

''The AFA will impose new foreign ownership and control restrictions

effective October 1, 2001. Under the AFA, foreign nationals may not own or control more than a 25% interest in any U.S. fishing vessel. This new restriction applies both ''at each tier of ownership'' and ''in the aggregate.'' In addition, long term marketing agreements with non-citizens as well as loans from non-citizens are subject to regulation under the AFA. See 46 CFR §§ 356.43, 356.45.

The AFA's new ownership and control restrictions are to apply retroactively to existing foreign investments and business arrangements. See Pub. L. No. 105–277, §§ 202–04, 112 Stat. 2681–636 (1998).

''Section 213(g) of the AFA, however, provides that the foreign ownership and control restrictions are not to apply to the extent that those restrictions are ''determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party.'' Pub. L. No. 105–277, § 213(g), 112 Stat. 2681–636 (1998). The FCN Treaty is an ''international agreement relating to foreign investment.'' As explained in greater detail below, applying the Act's ownership and control restrictions so as to preclude the Petitioners' ownership of, or control over, the Vessel would result in an inconsistency with the FCN Treaty. As a matter of statutory interpretation, then, Section 213(g) prohibits the application of those restrictions to Petitioners' interests in the Vessel.

(c) The U.S.-Japan FCN Treaty in Context

''The substantive background of the FCN Treaty makes clear that one of its central purposes was to protect precisely the type of interests at issue here. The U.S.-Japan FCN Treaty was modeled on a ''standard'' State Department treaty text, which formed the basis of more than a dozen FCN treaties that the United States entered into in the period immediately following World War II. All of these treaties, including the U.S.-Japan FCN Treaty, were part of the broader goal of the United States to encourage and protect foreign investment. As described by Herman Walker, Jr., who was responsible for the formulation of the postwar form of the FCN treaties and was also one of the chief FCN treaty negotiators, the FCN treaties are ''concerned with the protection of persons, natural and juridical, and of the property and interests of such persons.'' Herman Walker, Jr., Modern Treaties of Friendship. Commerce and Navigation, 42 Minn L. Rev. 805, 806 (1858) [hereinafter ''Modern Treaties''].

''Central to the structure of all of these treaties was the national-treatment principle, the notion that nationals of one Party should be treated like nationals of the other Party. As put by Walker, ''The right of corporations to engage in business on a national-treatment basis may be said to constitute the heart of the treaty.'' Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States,* 73 Pol. Sci. Q. 57, 67 (1958). The United States Supreme Court has likewise noted, in a case involving the interpretation of the U.S.-Japan FCN Treaty, that the purpose of the FCN treaties was ''to assure [foreign corporations] the right to conduct business on an equal basis without suffering discrimination based on their alienage.'' *Sumitomo Shoji America* v. *Avadiano,* 457 U.S. 176, 187–88 (1982). Indeed, according to the preamble of the U.S.-Japan FCN Treaty, ensuring that nationals of each Party be accorded ''national * * * treatment unconditionally'' by the other Party is one of the two general principles upon which the FCN Treaty was concluded. The word ''unconditionally'' is of course clear: it demonstrates the drafters'' intent that departures from the general principle of ''national treatment'' had to be articulated clearly. Indeed, in some instances, the Treaty does contain specific and limited exceptions to the national-treatment principle. See, *e.g.,* FCN Treaty Protocol, para. 6 (parties may impose restrictions on introduction of foreign capital in order to protect monetary reserves). Based simply on the preamble, then, the fact that the Treaty does not have such an exception for the forced divestiture of investments such as those at issue in the AFA strongly suggests, without more, that the Treaty meant to preclude application of such restrictions A more detailed look at the Treaty's substantive provisions, as set forth below, only reinforces that conclusion.

''Moreover, because the U.S.-Japan FCN Treaty shares language with many of the other post-war FCN treaties, the State Department has been called upon to interpret that language on many occasions. In the early 1980s, two studies commissioned by the State Department surveyed both the background of the treaties as well as the Department's subsequent interpretations. As explained in greater detail below, these two reports (known colloquially as the Jones Study and the Sullivan Study, after their respective primary authors) confirm the inconsistencies between the AFA's ownership and control restrictions and several provisions of the U.S.-Japan FCN Treaty, including in particular the national-treatment provisions.

''It is also worth noting that, as in most bilateral treaties, the relevant terms of the FCN Treaty are reciprocal—that is, the principle of ''national treatment'' applies not only to investment by Japanese nationals in the United States but also to investment by U.S. nationals in Japan. The Chief Counsel should thus consider the reciprocal implications of interpreting the FCN Treaty; that interpretation will effectively bind the United States government in situations involving *American* nationals that might wish to invest in *Japanese* businesses, both now and in the future. A cramped interpretation of the Treaty could thus hamper American foreign investment in unforeseen ways. Moreover, the State Department has interpreted FCN treaties broadly in the past, including the provisions articulating the national-treatment principle. See *generally State Dep't Practices Under U.S. Treaties of Friendship Commerce and Navigation* (1981) [hereinafter ''Jones Study'']. Consistency with the State Department's historical practice would thus also militate towards a liberal interpretation of the Treaty so as to protect the settled expectations of foreign investors.

''Finally, when interpreting the FCN Treaty, it is worth recalling the historical backdrop against which the Treaty was negotiated and adopted, because understanding that context puts perspective on the important role the Treaty plays in U.S.-Japan relations. The FCN Treaty was signed on April 2, 1953, less than a year after the end of the Allied military occupation of Japan (the legal conclusion of the state of war). Indeed, the FCN Treaty was an extension of one part of the 1951 Treaty of Peace with Japan, Article 12 of which declared Japan's ''readiness to enter into negotiations'' to conclude a treaty with the U.S. that would ''place [the two countries'] commercial relations on a stable and friendly basis.'' Signing the FCN Treaty so soon after the post-war restoration of Japanese national sovereignty was a significant step for both countries and was an implicit recognition that transnational investment and commerce are important elements in ''strengthening the bonds of peace and friendship.'' *See* FCN Treaty, preamble. Those bonds were built on, and continue to rest on, the principles of fairness and nondiscriminatory conduct embedded in the FCN Treaty and its national-treatment principles.

(d) Article VII—National Treatment in Commercial/Business Activities

''Article VII is ''the heart of the treaty. It is central to the basic treaty objective of providing rules of fair and equitable treatment. * * * The rule it embodies is national treatment.'' *State Dep't. Standard Draft—Treaty of Friendship, Commerce, and Navigation* 124 (undated) [hereinafter ''Sullivan Study'']. The relevant portions of Article VII have a three-part structure: (1) Article VII, paragraph 1, provides a broad grant of national treatment for all business activities; (2) the first sentence of Article VII, paragraph 2, provides for a few exceptions for certain sensitive activities, including one of relevance here; and (3) the second sentence of Article VII, paragraph 2, provides that, notwithstanding those exceptions, a Party may not impose new restrictions on entities of the other Party that were already participating in the activities in question. Article VII is thus inconsistent with the ownership and control restrictions of the AFA, as those restrictions impose new constraints on Maruha, an enterprise that has been involved in the U.S. fishing industry for over 35 years.

''Article VII(1) of the FCN Treaty requires the United States to give to ''[n]ationals and companies'' of Japan ''*national treatment* with respect to engaging *in all types of commercial,* industrial, financial *and other business activities* [in the U.S.], whether directly or by agent or through the medium of any form of lawful juridical entity.'' FCN Treaty, Art. VII(l) (emphases added). Article XXII(1) defines ''national treatment'' as ''treatment accorded within the territories of a Party upon terms *no less favorable* than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.'' FCN Treaty, Art. XXII(1) (emphasis added). This grant of national treatment includes the right of Japanese-controlled enterprises to be ''accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of [the U.S.]'' FCN Treaty, Art. VII(1); see *also Sumitomo,* 457 U.S. at 188 n.18 (''[N]ational treatment of corporations means equal treatment with domestic corporations.''); *Modern Treaties,* 42 Minn L. Rev. at 811 (''[T]he objective [of the ''national treatment'' provisions] is to secure non-discrimination or equality of treatment * * * as compared with citizens of the [U.S.] and national things.''). As applied to Petitioners' interests in the Vessel, the AFA clearly treats enterprises controlled by Japanese nationals and corporations ''less favorabl[y] than [the treatment] accorded like enterprises controlled by nationals and companies of [the U.S.]'' and is thus inconsistent with Article VII(1).

The national-treatment provision of Article VII, paragraph 1, is limited by the first sentence of Article VII, paragraph 2, which reserves for each nation ''the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on * * * enterprises engaged in * * * the exploitation of * * * natural resources.'' Article VII(2) provides the parties to the Treaty with what is known as a ''screening'' right, the right to ''screen'' foreign investments in ''certain sensitive lines of business, specially affected with a public interest.'' See *Modern Treaties,* 42 Minn. L. Rev. at 818. As fisheries are generally considered a ''natural resource,'' this provision would appear to permit the United States to impose foreign ownership and control restrictions on fishing industry vessels under this exception, notwithstanding the national-treatment requirement in Article VII, paragraph 1.

''The very next sentence of Article VII, paragraph 2, however, places limits on the ''screening'' exception to the national-treatment principle. It makes clear that any such restrictions shall not be imposed on any enterprise that was engaged in the fishing industry prior to promulgation of the AFA. Article VII(2) states, ''*[N]ew limitations* imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on [the activities described in the first sentence of Article VII(2)] within its territories, *shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted* and which are owned or controlled by nationals and companies of the other Party.'' FCN Treaty, Art. VII(2) (emphases added). In effect, then, this sentence requires that any such ownership or control restrictions grandfather those companies, such as Petitioners, that were engaged in the fishing industry prior to promulgation of the AFA. In short, the ability to ''screen'' foreign investments prior to their being made does not bring with it the right to restrict those Japanese nationals, like Maruha, that have already made investments in the industry.

''This plain text interpretation of the language of the second sentence of Article VII(2) also comports with past State Department practice. See Jones Study at 57 (noting that pursuant to this sentence, ''protection is afforded to any privilege granted * * * prior to a change in national treatment; hence, at a minimum these foreign enterprises are guaranteed the maintenance of their existing operations''); *see also id.* at 107 (''[R]egulations that force divestiture of interests already acquired or established prior to the promulgation of such regulation[s] * * * raise Art. VII questions.''); *cf. also Modern Treaties,* 42 Minn. L. Rev. at 809 (recognizing that exceptions to national treatment principle were necessary, but noting that ''[t]he aim is to * * * guarantee duly established investors against subsequent discrimination. The failure to find a welcome as to entry is of much less importance than would be a failure, once having entered and invested in good faith, to be protected against subsequent harsh treatment.''). It also comports with the clear intent of the drafters. In describing the import of the phrase ''new limitations,'' the State Department's Sullivan Study states,

> ''The net effect [of the second sentence of Article VII(2)] is that, although [the United States is not] obligated to allow alien interests to become established in those fields of activity, *rights which have been extended in the past shall be respected and exempted from the application of new restrictions.''*

Sullivan Study at 149 (emphasis added).

''More even than the national-treatment principle, the prohibition on the imposition of new limitations on foreign entities already engaged in a particular industry is a matter of basic fairness. See Sullivan Study at 148 (''The second sentence of Article VII(2) is a grandfather clause intended in the interest of fairness to protect legitimately established alien enterprises against retroactive impairment.''). Here, not only were Maruha, WSI and WAF each ''engaged in'' the fishing business prior to the AFA's promulgation, but their investments in that industry were actively encouraged by the ''Fish and Chips'' policy of the United States government. The concerns of the Treaty's drafters are thus doubly implicated.

''Article VII, then, completely precludes application of the AFA's ownership and control restrictions to Petitioners since Petitioners had interests in vessels with fishery endorsements prior to the AFA's adoption. As the language of the second sentence of Article VII, paragraph 2, makes clear, the Treaty protects *enterprises* engaged in the restricted activities (*i.e.,* commercial fishing) rather than protecting simply the particular property interests related to

those activities (such as the fishing vessels themselves). *Cf.* Sullivan Study at 137 (noting that the term ''enterprises'' was used ''to designate a business entity or undertaking irrespective of the particular form it has for legal purposes''). Its purpose was to ensure that foreign-owned or foreign-controlled companies already engaged in a particular industry were given full national treatment—that is, treated like U. S. nationals—and were permitted to compete against their domestic competitors without any impediments not suffered by those domestic companies. Since Petitioners were clearly ''engaged in * * * the exploitation of * * * natural resources'' prior to the AFA's adoption, the Treaty, if applied as its language mandates, would completely preclude application of the AFA's foreign ownership and control restrictions to any of Petitioners' activities.

''Section 213(g) makes clear, however, that as a matter of statutory—as opposed to treaty—interpretation, the AFA's ownership and control provisions are not to be applied retroactively, although they may be applied prospectively. The provisions are not to be applied to the extent that a foreign owner's or mortgagee's interest in a vessel precedes October 1, 2001. The first sentence of section 213(g) provides that, if any of the ownership and control provisions are determined to be inconsistent with the treaty, those provisions ''shall not apply * * * to the extent of any such inconsistency.'' The second sentence of section 213(g), however, allows them to be applied prospectively, stating that the ownership and control provisions

> shall apply to all subsequent owners and mortgagees of such vessel, and shall apply, notwithstanding the previous sentence, to the owner on October 1, 2001 of such vessel if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity after such date.

Pub. L. No. 105–277, § 213(g), 112 Stat. 2681–616, 2681–637 (1998). Thus, since Petitioners' interests in the Vessel predates October 1, 2001, those interests are protected under the explicit language of the statute.

(e) Article IX(2)—National Treatment in Owning/Possessing Movable Property

''Article IX(2) of the FCN Treaty is another national-treatment provision that conflicts with the AFA, and the analysis of that conflict mimics that of Article VII, described above. The first sentence of Article IX(2) states that the United States must accord ''[n]ationals and companies'' of Japan ''national treatment * * * with respect to owning and possessing[] movable property of all kinds, both tangible and intangible.'' Just as they conflict with Article VIPs mandate of national treatment with respect to business activities, the AFA's ownership and control restrictions obviously impair Petitioners' ability to ''own[] [or] possess[] movable property''—namely, the Vessel—in ways that American-owned companies are not affected. Petitioners are thus not being ''accorded * * * national treatment * * * with respect to owning and possessing[]'' U.S. flag vessels.

The second sentence of Article IX(2) then says,

> However, either Party may impose restrictions on * * * alien ownership of interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

''In effect, then, the second sentence of Article IX(2) subjects the ''national treatment for owning immovable property'' provision of the first sentence of Article IX(2) to the same constraints as Article VII(1): The United States may impose limitations on the acquisition of interests in the exploitation of natural resources (such as fish), but may not impose *new* restrictions on enterprises such as Petitioners that were engaged in the fishing business prior to the adoption of those restrictions. The AFA's ownership and control restrictions are thus inconsistent with Article IX(2) of the FCN Treaty.

(f) Article VI(3)—No Takings Without Just Compensation

''The first sentence of Article VI, paragraph 3, of the FCN Treaty states that ''[p]roperty of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation.'' This is in effect a ''takings clause'' which precludes expropriations and other measures that substantially impair a Japanese national's property rights. Applying the AFA's ownership or control restrictions to prohibit Petitioners from maintaining their pre-existing interests in the Vessel would effectively render Petitioners' interests in the Vessel nearly worthless and would thus violate Article VI(3) of the Treaty.

''First, the term ''property'' includes not simply direct equity stakes in property but also a wide variety of property interests, such as those that Petitioners have in the Vessel. The Protocol to the FCN Treaty explicitly states that ''[t]he provisions of Article VI, paragraph 3, * * * shall extend to interests held directly *or indirectly* by nationals and companies of either Party in property which is taken within the territories of the other Party.'' FCN Treaty Protocol, para. 2 (emphasis added). As the United States delegates made clear during the negotiation of the Treaty, the phrase ''interests held directly or indirectly'' ''is intended to extend to every type of right or interest in property which is capable of being enjoyed as such, and upon which it is practicable to place a monetary value. These direct and indirect interests in property include not only rights of ownership, but [also] * * * lease hold interest[s], easements, contracts, franchises, and other tangible and intangible property rights.'' See Memorandum of Conversation dated April 15, 1952, at 3. In short, ''all property interests are contemplated by the provision.'' Id. This necessarily includes not only the indirect equity stake Petitioners have in the Vessel but also the other contracts that might indicate some level of ''control'' within the meaning of the AFA.

''Second, the concept of a taking in this context is broad and ''is considered as covering, in addition to physical seizure, a wide variety of whole or partial sequestrations *and other impairments of interests in or uses of property.*'' See Sullivan Study at 116 (emphasis added). Therefore, the fact that applying the AFA's ownership and control restrictions to Petitioners' interests in the Vessel would effectively result in a forced sale of the Vessel at a bargain basement price is a sufficient impairment of rights to constitute a violation of Article VI(3).

''Third, the Treaty requires that the taking be for a ''public purpose,'' and it is doubtful whether application of the AFA's ownership or control restrictions to Petitioners' interests in the Vessel would implicate a ''public purpose'' within the meaning of the FCN Treaty, given that the primary result would simply be a windfall to private U.S. nationals. Even if the AFA's putative goal of Americanization of the fishing industry could be characterized as a ''public purpose,'' the AFA makes no provision for the ''prompt payment of just compensation,'' as required by the Treaty. Indeed, more than the Takings Clause of the United States Constitution's Fifth Amendment, Article VI(3) of the FCN Treaty details the payment procedures with which a government must comply in the event of a taking. After the first sentence, quoted above, Article VI(3) goes on to say,

''Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.'' The fact that the AFA and 46 CFR part 356 both fail to provide *any* compensation scheme—let alone, ''*adequate* provision * * * at or prior to the time of taking''—thus renders any application of those ownership or control restrictions to Petitioners' interests in the Vessel inconsistent with Article VI, paragraph 3, of the FCN Treaty.

(g) Article V—Prohibition on Discriminatory Measures

''Article V of the FCN Treaty prohibits the United States from ''tak[ing] unreasonable or discriminatory measures that would impair the legally acquired rights or interests * * * of [Japanese] nationals and companies in the enterprises which they have established.'' This is a catch-all provision that reinforces both the national-treatment principles in Articles VII and IX(2) and the property-rights principles in Article VI(3). The term ''discriminatory'' in this clause includes ''denials of * * * national * * * treatment,'' Sullivan Study at 115, such as that which would be occasioned by application of the AFA's ownership and control provisions to Petitioners' interests in the Vessel. Moreover, there is no question that the phrase ''legally acquired rights or interests'' means exactly what it says and includes interests such as those Petitioners have in the Vessel. See id. (''[T]he intent is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful.'').

(h) Article XIX(6)—National Fisheries Clause

''As discussed above, application of the AFA's ownership and control restrictions to Petitioners' interests in the Vessel clearly conflict with several provisions of the FCN Treaty. Article XIX(6) deals specifically with fisheries issues, and although it might at first appear to support a different result, it does not undermine the conclusion that the Treaty is inconsistent with the ownership and control restrictions in both the AFA and 46 CFR part 356.

''Article XIX, paragraph 6, of the Treaty states, ''Notwithstanding any other provision of the present Treaty, each Party may reserve exclusive rights and privileges to its own vessels with respect to the * * * national fisheries * * *'' Though a cursory reading of this language might lead one to believe this provision permits foreign ownership or control restrictions with respect to fishing vessels, there are two reasons why Article XIX(6) does not permit application of the AFA's foreign ownership and control restrictions to Petitioners' interests in the Vessel.

''First, Article XIX, paragraph 7, defines the term ''vessel'' to exclude ''fishing vessels'' for the purposes of Article XIX(6). Thus, by its terms, Article XIX(6) simply does not apply to vessels such as the Vessel, because any vessel seeking a fishery endorsement is quite clearly a ''fishing vessel.''

''Second, even if Article XIX(6) were to apply to ''fishing vessels,'' it would be irrelevant to foreign ownership and investment restrictions. The Treaty's text and negotiating history, along with subsequent State Department practice, support this view. The text makes clear that Article XIX(6) simply permits the United States to reserve fishing rights and privileges to ''its own vessels''—that is, U.S. flag vessels. It says nothing about a Party's right to restrict foreign investment in, or ownership of, that Party's ''own vessels'' and thus cannot be read to exempt such restrictions from the Treaty's requirement of national treatment.

''The historical record of the negotiations provides further evidence of this straightforward textual reading. At one point, the Japanese negotiators proposed rewriting Article XIX(6) so as effectively to add the words ''nationals,'' and ''companies'' to the reference to ''vessels.'' The Japanese sought language that would have stated that the Treaty was not to be construed to extend to ''*nationals, companies and* vessels of the other Party any special privileges reserved to national fisheries.'' See Memorandum of Conversation dated April 3, 1952, at 5. The State Department understood this as an attempt by the Japanese to seek a blanket exception from the entire Treaty for national fisheries. See U.S. Dep't of State, Outgoing Airgram to U.S. Embassy in Tokyo (June 12, 1952), at 1–2 (noting that a clearer way to effect the Japanese intent was with a single comprehensive exception stating that ''[t]he provisions of the present Treaty shall not apply with respect to the national fisheries of either Party, or to the products of such fisheries''). The Japanese proposal was not adopted, and the language of Article XIX(6) remained unchanged, limiting its scope to *vessels* of the other Party, thereby underscoring the fact that Article XIX(6) applies only to Japanese-flag vessels and not to Japanese citizens or companies.

''Subsequent practice of the State Department also confirms this reading of Article XIX(6). In 1964, the State Department reaffirmed the narrow nature of the exclusion in Article XIX(6) in a letter to the House Committee on Merchant Marine and Fisheries. The letter makes clear that the provision merely permits the United States to reserve the right to catch or land fish to U.S. flag vessels. See Jones Study at 80–81.

''This reading of the U.S.-Japan FCN Treaty also comports with the State Department's reading of this same language in other FCN treaties to which the U.S. is a party. The Sullivan Study explicitly states that ''[t]he crucial element in Article XIX is that it relates to the treatment of *vessels* and to the treatment of their cargoes. *It is not concerned with the treatment of the enterprises which own the vessels* and the cargoes.'' See Sullivan Study at 284 (emphasis added).

''Thus, the text, negotiating history and subsequent practice and understanding explicitly confirm that Article XIX(6) is irrelevant to, and thus does not exempt from the Treaty's other provisions, laws restricting foreign ownership and control of the entities that own U.S. flag vessels seeking fishery endorsements. As a result, Article XIX(6) does not exempt the AFA's ownership and control restrictions from Articles V, VI(3), VII, and IX(2), each of which bars application of those restrictions to Petitioners' interests in the Vessel.

Conclusion

''Applying the AFA's ownership and control restrictions so as to preclude Petitioners from maintaining their interests in the Vessel violates both the spirit and the text of the FCN Treaty, which guarantees nationals of one Party ''national treatment'' by the other and precludes the imposition of measures that effectively strip a Japanese national of its legally-acquired property rights.''

This concludes the analysis submitted by Petitioner for consideration.

Dated: December 12, 2000.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 00–32160 Filed 12–18–00; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–00–8026 (PDA–26(R))]

Application by Boston & Maine Corporation for a Preemption Determination as to Massachusetts' Definitions of Hazardous Materials

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice Extending Period for Public Comment.

SUMMARY: RSPA is extending the period for interested parties to submit comments on an application by Boston & Maine Corporation for an administrative determination whether Federal hazardous materials transportation law preempts the Commonwealth of Massachusetts' definitions of ''hazardous materials'' as applied to hazardous materials transportation.

DATES: Comments received on or before February 2, 2001, and rebuttal comments received on or before March 19, 2001, will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. The application and all comments are also available on-line through the home page of DOT's Docket Management System, at ''http://dms.dot.gov.''

Comments must refer to Docket No. RSPA–00–8026 and may be submitted to the docket either in writing or electronically. Send three copies of each written comment to the Dockets Office at the above address. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. To submit comments electronically, log onto the Docket Management System website at http://dms.dot.gov, and click on ''Help & Information'' to obtain instructions.

A copy of each comment must also be sent to (1) Robert B. Culliford, Esq., Corporate Counsel, Boston & Maine Corporation, Iron Horse Park, North Billerica, MA 01862, and (2) Ginny Sinkel, Esq., Assistant Attorney General, Commonwealth of Massachusetts, Office of the Attorney General, One Ashburton Place, Boston, Massachusetts 02108–1698. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: ''I certify that copies of this comment have been sent to Mr. Culliford and Ms. Sinkel at the addresses specified in the **Federal Register**.'')

A list and subject matter index of hazardous materials preemption cases, including all inconsistency rulings and preemption determinations issued, are available through the home page of RSPA's Office of the Chief Counsel, at ''http://rspa-atty.dot.gov.'' A paper copy of this list and index will be provided at no cost upon request to Ms. Christian, at the address and telephone number set forth in **FOR FURTHER INFORMATION CONTACT** below.

FOR FURTHER INFORMATION CONTACT: Karin V. Christian, Office of the Chief Counsel, Research and Special Programs Administration (Tel. No. 202–366–4400), Room 8407, U.S. Department of Transportation, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: On November 16, 2000, RSPA published a notice in the **Federal Register** inviting interested parties to submit comments on an application by Boston & Maine Corporation for an administrative determination of whether Federal hazardous materials transportation law preempts the Commonwealth of Massachusetts' definitions of ''hazardous materials'' as applied to hazardous materials transportation. See 65 FR 69365.

On December 12, 2000, the Commonwealth of Massachusetts Department of Fire Services and Department of Environmental Protection (the Commonwealth) sent RSPA a letter requesting a 30-day extension of time to comment on the preemption application. The Commonwealth states that Boston & Maine Corporation has assented to the request for an extension of time. Accordingly, RSPA is extending the comment period to February 2, 2001 and the rebuttal comment period to March 19, 2001.

Issued in Washington, DC on December 14, 2000.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 00–32322 Filed 12–18–00; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33970]

Minnesota Southern Railway, Inc.—Lease and Operation Exemption—Buffalo Ridge Regional Rail Authority

Minnesota Southern Railway, Inc. (MSWY), a Class III rail carrier, has filed a notice of exemption under 49 CFR 1150.41 to lease and operate approximately 41.44 miles of rail line owned and operated by Buffalo Ridge Regional Rail Authority (BRRA) between milepost 0.0, at Agate, MN, and milepost 41.44, at Manley, MN.[1] MSWY states that BRRA has agreed to lease its rail line to MSWY in order to provide continuous rail service to shippers located along the rail line. MSWY certifies that its projected revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier.

The earliest the transaction can be consummated is December 11, 2000, the effective date of the exemption (7 days after the exemption was filed).

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33970, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Brent A. Polanchek, P.O. Box 562, Luverne, MN 56156.

Board decisions and notices are available on our website at *http://WWW.STB.DOT.GOV.*

Decided: December 8, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 00–32013 Filed 12–18–00; 8:45 am]

BILLING CODE 4915–00–P

[1] *See Buffalo Ridge Regional Railroad Authority—Operation Exemption—Rail Lines Between Manley and Worthington, MN*, STB Finance Docket No. 33925 (STB served Sept. 22, 2000).

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In order to comply with the mandate of section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Bahrain
Iraq
Kuwait
Lebanon
Libya
Oman
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen, Republic of

Dated: December 12, 2000.

Manal Corwin,

Acting International Tax Counsel (Tax Policy).

[FR Doc. 00–32207 Filed 12–18–00; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF VETERANS AFFAIRS

Nondiscrimination on the Basis of Sex in Education Programs or Activities; Receiving Federal Financial Assistance

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In accordance with Subpart F of the final common rule for the enforcement of Title IX of the Education Amendments of 1972, as amended (''Title IX''), this notice lists Federal financial assistance administered by the Department of Veterans Affairs (VA) that is covered by Title IX. Title IX prohibits recipients of Federal financial assistance from discriminating on the basis of sex in education programs or activities. Subpart F of the Title IX common rule requires each Federal agency that awards Federal financial assistance to publish in the **Federal Register** a notice of the Federal financial assistance covered by the Title IX regulations within sixty (60) days after the effective day of the final common rule. The final common rule for the enforcement of Title IX was published in the **Federal Register** by twenty-one (21) Federal agencies, including VA, on August 30, 2000 (65 FR 52857–52895).

FOR FURTHER INFORMATION CONTACT: Tyrone Eddins, Office of Resolution Management, at (202) 273–6522; or Royce Smith, Office of General Counsel, at (202) 273–6374, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420.

SUPPLEMENTARY INFORMATION: Title IX prohibits recipients of Federal financial assistance from discriminating on the basis of sex in educational programs or activities. Specifically, the statute states that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, with specific exceptions for various entities, programs, and activities. 20 U.S.C. 1681(A). Title IX and the Title IX common rule prohibit discrimination on the basis of sex in the operation of, and the provision or denial of benefits by, education programs or activities conducted not only by educational institutions but by other entities as well, including, for example, law enforcement agencies, departments of corrections, and for profit and nonprofit organizations.

List of Federal Financial Assistance Administered by the Department of Veterans Affairs to Which Title IX Applies

Note: All recipients of Federal financial assistance from VA are subject to Title IX, but Title IX's anti-discrimination prohibitions are limited to the educational components of the recipient's program or activity, if any.

Failure to list a type of Federal assistance below shall not mean, if Title IX is otherwise applicable, that a program or activity is not covered by Title IX.

The following types of Federal financial assistance were derived in part from Appendix A of VA's Title VI regulations, 38 CFR part 18, subpart A:

1. Payments to State homes (38 U.S.C. 1741–1743).

2. State home facilities for furnishing domiciliary, nursing home, and hospital care (38 U.S.C. 8131–8137).

3. Space and office facilities for representatives of recognized national organizations (38 U.S.C. 5902(a)(2)).

4. Sharing of medical facilities, equipment, and information (38 U.S.C. 8151–8157).

5. Approval of educational institutions (38 U.S.C. 104).

6. Space and office facilities for representatives of State employment services (38 U.S.C. 7725(1)).

7. Medical care for survivors and dependents of certain veterans (38 U.S.C. 1713).

8. Transfers for nursing home care; adult day health care (38 U.S.C.1720).

9. Treatment and rehabilitation for alcohol or drug dependence or abuse disabilities (38 U.S.C. 1720a)

10. Assistance in establishing new medical schools; grants to affiliated medical schools; assistance to health manpower training institutions (38 U.S.C. Chapter 82).

11. Department of Veterans Affairs health professional scholarship program (38 U.S.C. 7601–7655).

12. Montgomery GI Bill (Active Duty), Chapter 30 (38 U.S.C. 3001).

13. Montgomery GI Bill (Selected Reserve), Chapter 1606 (10 U.S.C. 16131).

14. Veterans Educational Assistance Program (VEAP), Chapter 32 (38 U.S.C. 3221).

15. Vocational Rehabilitation for Disabled Veterans, Chapter 31 (38 U.S.C. 3102).

16. Survivors and Dependents Educational Assistance, Chapter 35 (38 U.S.C. 3510).

17. National Service Officers Training Program (38 U.S.C. Chapter 31).

18. Loan Guaranty Training to Private Sector Participants (*e.g.,* lenders, servicers, appraisers, real estate professionals, builders, real estate professionals, builders, repair contractors, property managers, etc.) (38 U.S.C. Chapter 37).

Approved: December 7, 2000.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

[FR Doc. 00–32280 Filed 12–18–00; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
December 19, 2000

Part II

Department of Transportation

Office of the Secretary

49 CFR Part 40

Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–99–6578]

RIN 2105–AC49

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation is revising its drug and alcohol testing procedures regulation. The purposes of the revision are to make the organization and language of the regulation clearer, to incorporate guidance and interpretations of the rule into its text, and to update the rule to include new provisions responding to changes in technology, the testing industry, and the Department's program.

EFFECTIVE DATES: The amendments to the current 49 CFR part 40 are effective January 18, 2001. The revised 49 CFR Part 40 is effective August 1, 2001.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., Room 10424, Washington DC, 20590, 202–366–9310 (voice), 202–366–9313 (fax), or *bob.ashby@ost.dot.gov* (e-mail); Mary Bernstein, Director, Office of Drug and Alcohol Policy and Compliance (ODAPC), 400 7th Street, SW., Room 10403, Washington DC, 20590, 202–366–3784 (voice), 202–366–3897 (fax), or *mary.bernstein@ost.dot.gov* (e-mail); or Jim L. Swart, Drug and Alcohol Policy Advisor, ODAPC , same address and phone numbers as above, *jim.swart@ost.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

The Department of Transportation first published its drug testing procedures regulation (49 CFR part 40) on November 21, 1988 (53 FR 47002), as an interim final rule. We based the rule on the Department of Health and Human Services (HHS) guidelines for Federal agency employee drug testing, with some changes to fit the transportation workplace. The Department published a final rule responding to comments on the interim rule a year later (54 FR 49854; December 1, 1989).

The Department added alcohol testing procedures to Part 40 in a February 1994 final rule. This rule also made other changes to Part 40, including requirements for split samples in four operating administration rules. Since that time, the Department has amended specific provisions of Part 40 on various occasions (*e.g.,* with respect to non-evidential alcohol screening devices and ''shy bladder'' procedures).

In the years since Part 40 was first published, the Department issued a large volume of guidance and over 100 written interpretations, as well as a significant amount of informal advice. Most of this material has not previously been incorporated into the rule text. There have been changes in testing technology, the structure of the drug and alcohol testing business, and the functioning of the Department's drug and alcohol testing programs that make it desirable to update our regulatory provisions. Because the rule was originally based on that of another agency (*i.e.,* HHS), there are some provisions that never were a close fit for the Department's programs. Moreover, the rule's organization and language do not meet the objectives of the Clinton Administration's current ''Plain Language'' policies. Under section 610 of the Regulatory Flexibility Act, agencies are directed to review existing rules from time to time with an eye to their effects on small businesses and other small entities.

For all these reasons, the Department decided to review Part 40. As a first step, we issued an advance notice of proposed rulemaking (ANPRM) on April 29, 1996 (61 FR 18713), asking for suggestions for change in the rule. We received 30 comments in response to this ANPRM. We then issued a notice of proposed rulemaking (NPRM) on December 9, 1999 (64 FR 69076). This NPRM proposed a comprehensive revision to Part 40. In response to the NPRM, we received letters from over 400 commenters, making around 4000 individual suggestions concerning the rule. We also held three public listening sessions, at which numerous interested parties commented further on the Department's proposals, and we held an internet forum. The final rule responds to all the comments and makes significant alterations to the existing rules governing the Department's drug and alcohol testing programs.

Structure of the Rule

Perhaps the first thing readers will notice about this final rule is that we have thoroughly restructured Part 40, with subparts organized by subject matter area. Like the NPRM, and in contrast to the existing rule, the text is divided into many more sections, with fewer paragraphs each on average, to make it easier to find regulatory provisions. The rule uses a question-answer format, with language specifically directing particular parties to take particular actions (e.g., ''As an employer, you must * * *''). We have also tried to express the requirements of the rule in plain language. Commenters were very complimentary about the reorganization of the rule, generally praising it as much clearer and easier to follow than the existing rule. The Department received a plain language award, known as the ''No Gobbledygook Award,'' from Vice President Gore's National Partnership for Reinventing Government in recognition of the improved clarity of the regulation. We have retained the NPRM's format and organization, which we believe will help drug and alcohol testing program participants understand and effectively carry out this rule.

What matters most in a rulemaking is not the number of letters favoring or opposing a particular proposal. Our central concern is with the substance of the comments. In discussing comments on this rule and our response to them, we will focus on the substance of positions that commenters expressed, and on why we did or did not make changes in response to various comments. In writing the preamble, we have avoided counting up the number of comments supporting a given position except in the most general way, believing that doing so would distract from the discussion of substantive issues.

Effective Dates

The Department has decided to establish an August 1, 2001, effective date for the revised Part 40. We recognize that there is always some difficulty for everyone involved in the transition between an existing rule and a new rule. We hope that this delayed effective date will ease the transition. During the period between publication and August 1, program participants will have the opportunity to learn about new provisions before having to implement them. During this period, the Department expects to develop and issue guidance (*e.g.*, a revised medical review officer (MRO) manual) and make presentations at a significant number of conferences and training sessions. In addition, August 1 is the date on which use of the new Federal Drug Testing Custody and Control Form (CCF), to which the text of the revised Part 40 refers, becomes mandatory.

However, we believe it is important to begin implementing some new provisions sooner, since they enhance the fairness and integrity of the process. To do so, we must amend the *existing*

Part 40 to include these provisions, so that they are in effect during the period before the August 1 effective date of the entire new version of the regulation. Come August 1, the existing Part 40 (including the amendments we are issuing today) will be replaced, in its entirety, by the new Part 40. Since the substance of today's amendments will be the same in both versions of the document, there will be no change in how we implement them after August 1.

The provisions requiring MRO review and split specimen testing following adulteration and substitution findings will go into effect in 30 days. The majority of laboratories already perform validity testing on a voluntary basis. Making the MRO review and split specimen procedures effective in 30 days will make these additional protections available in connection with this existing validity testing. At the same time, a provision explicitly authorizing the continuation of this existing practice under the new rule will go into effect. To the extent that the Department's September 1998 guidance memorandum concerning adulterated, substituted, dilute, and unsuitable tests is inconsistent with any provisions of these amendments, we regard that guidance as having been superseded on the effective date of the amendments.

HHS is currently working mandatory requirements for validity testing. HHS is projecting completion of this project by August 1, 2001. We believe that, to avoid any potential uncertainty about the standards and procedures for mandatory validity testing, DOT should put its mandate for validity testing into effect simultaneously with the new HHS requirements. Consequently, in the event HHS has not issued its new requirements by that date, we will publish a subsequent **Federal Register** notice postponing the Auust 1, 2001, effective date for mandatory validity testing.

Another provision that we are including in the amendments to the existing Part 40, and that will go into effect in 30 days, is the public interest exclusion system. These provisions are very important to ensuring accountability in the provision of drug and alcohol testing. In addition, we are making the provisions of § 40.5 effective in 30 days as § 40.203, since the Department expects to be issuing guidance materials on the new Part 40 before August 1, 2001.

For readers' convenience, here is a table of the relationship between the section numbers in the amendments to current Part 40 that go into effect in 30 days and the section numbers of the corresponding sections of the new, revised Part 40 that goes into effect on August 1, 2001:

Amended current part 40	New revised part 40
40.201	40.3
40.203	40.5
40.205	40.89
40.206	40.91
40.209	40.93
40.211	40.95
40.213	40.99
40.215	40.145
40.217	40.179
40.219	40.181
40.221	40.183
40.223	40.187
40.225	40.191
Subpart F (same section numbers).	Subpart R

Principal Policy Issues

In addition to often very detailed paragraph-by-paragraph comments on the text of the NPRM, commenters focused on several major policy issues. These included employee stand-down, validity testing, the public interest exclusion mechanism, the return-to-duty process, transmission of test results and other information through consortia and third-party administrators, reporting and storing information through electronic means, and reporting violations to DOT agencies. Issues also arose concerning confidentiality of information, conflicts of interest among service providers, training, and the collection process. In this preamble, we will discuss these policy issues first. After that, we will proceed to a section-by-section discussion of the rule, including the Department's responses to specific comments.

Stand-Down

Stand-down refers to an employer practice of temporarily removing an employee from performance of safety-sensitive duties upon learning that the individual had a confirmed laboratory positive drug test, but before the MRO has completed the verification process. The existing regulation prohibits stand-down. MROs are not permitted to inform employers about the existence of a confirmed laboratory positive test pending verification, and employers are not allowed to take any action concerning an employee until they receive the MRO's notification of a verified positive test.

The preamble to the NPRM noted the reasons for the current policy: stand-down undercuts the rationale for MRO review, can compromise the confidentiality of test results, and may result in unfair stigmatization of an employee as a drug user. While the rationale for stand-down is that it enhances safety, the Department has no evidence that the current policy has compromised safety. For example, we are not aware of any case in which an employee has had a drug-related accident while verification of a confirmed positive drug test was pending.

The preamble also noted that some employers advocated the use of stand-down as a measure to enhance safety and reduce liability. They wanted to use this approach to eliminate, as far as possible, any risk that someone who had tested positive would be involved in an accident before the MRO could complete the verification process. We noted that, essentially for this reason, the Department's own internal drug testing program stood down some employees (*e.g.*, air traffic controllers) in some circumstances following a report of a confirmed positive laboratory test.

The NPRM regulatory text proposed two alternatives, one of which prohibited, and the other of which permitted, stand-down. The alternative that permitted stand-down included requirements to help safeguard employees' interests in confidentiality and fairness.

Comments

Comments were sharply, and fairly evenly, divided on this issue. Some commenters, mostly employers and some service agents, supported stand-down. A few of these comments went further and urged that stand-down be made mandatory, while a greater number said that it should be discretionary with each employer. A smaller number of commenters, including all unions and other employee organizations as well as some employers and service agents, opposed permitting stand-down.

The most important argument cited by stand-down supporters was safety. Safety is a more important objective than confidentiality, many of them said. Even if there have not been documented cases of safety problems occurring in the absence of stand-down, no employer wants to be the first to face such a situation. Many employers may feel it so important to stand down employees on safety grounds that they would have an incentive to violate this prohibition. Avoiding unnecessary liability is also a consideration: It would be unwise, commenters said, to force a company to permit an employee it knew had a confirmed positive laboratory test to continue driving a commercial truck or flying a plane during the verification process.

Supporters also noted that, in most cases, there were very low rates of confirmed laboratory positive tests being verified negative (indeed, some drugs, like PCP, have no legitimate medical uses that would support a negative verification). Therefore, they said, stand-down would not adversely affect more than the small number of drivers with confirmed positive laboratory results that an MRO later verified negative. Other commenters said that adverse consequences for employees could be minimized by employers choosing to keep employees in non-safety-sensitive positions until verification or ensuring that employees whose tests were ultimately verified negative did not suffer any loss of pay or other adverse consequences.

Opponents of stand-down said that the practice embodied a ''guilty until proved innocent'' approach that was manifestly unfair and ignored the purpose of having MRO review of positive tests. Confidentiality provisions would likely be inadequate. In practice, the ''word'' would get out that the employee had a confirmed laboratory test result and the employee—even if the MRO ultimately verified the test as negative—would be stigmatized in the workplace as a drug user. This would upset the regulatory balance between safety interests and the protection of employees from unfair consequences of the process. One motor carrier association said that this would be a particular problem in its industry. In large carriers, an employee cannot be taken out of service without involvement by multiple management employees. For unionized carriers in which assignments are made by seniority, it would be impossible to take a driver out of service without other drivers knowing it.

Some commenters contested the safety rationale of stand-down by pointing out that a positive drug test does not indicate impairment. Other commenters said that the risk to the public from the current ''no stand-down'' policy was minimal, given that there were no known instances of accidents resulting from the absence of stand-down. Opponents also cited pay, privacy, and personnel consequences, as well as potential Americans with Disabilities Act and other issues potentially comploicating implementation of stand-down.

An associated issue concerns pay status. If a company stands down an employee, should the company be required to pay the employee during this period, pending verification? Several commenters directly addressed this issue. About half of them, including a union and some employers and their associations, favored paying employees while they were in a stand-down status. The remainder said either that the regulation should be silent on the issue, with labor-management negotiations deciding the matter in each case, or that employees should not be paid while in stand-down status.

While a number of comments addressed confidentiality and privacy issues, they provided little detail in the way of suggestions for how best to accomplish these objectives in a stand-down situation. Likewise, while a few commenters noted that confidentiality might be a more difficult issue in small companies, they did not provide any suggestions for how to address the issue. There was a suggestion that, to deal with the situation of owner-operators in the motor carrier industry, service agents be empowered to stand down these individuals.

DOT Response

At the time of the NPRM, the Department recognized enough merit on both sides of this argument to propose alternative provisions. Having reviewed the comments, we remain convinced that advocates of both basic positions on the issue make some strong points. The Department is also aware that potential future changes in drug testing technology, such as the advent of HHS-approved on-site testing and alternative testing methods, may alter the response the Department's procedures take concerning stand-down in the future. Consequently, the Department is taking a middle-ground position on this difficult issue.

The general rule will remain that stand-down is prohibited. The reasons for this general rule are the reasons articulated in the existing rule, the NPRM, and the comments from stand-down opponents. However, we believe it is necessary to respond to the genuine and plausible safety concerns of commenters favoring stand-down, the fact that safety is the Department's highest priority, and the fact that the Department's internal program uses a form of stand-down. Therefore, the Department will establish a waiver mechanism that permits employers, on a case-by-case basis, to request DOT agency approval for a specific, well-founded stand-down plan that effectively protect the interests of employees.

This approach makes the Department's approach to its internal and external programs consistent with one another. When the Department, in its role as an employer, wanted to use a stand-down approach, it sought and received a waiver from HHS, whose drug testing guidelines also generally prohibit stand-down. Under the final rule, employers in the external program who wish to employ stand-down can, in an analogous way, seek a waiver from the Department of Transportation.

We realize that some employers have employees that are regulated by more than one DOT agency. To avoid unnecessary administrative burdens in the waiver process, such an employer would have to submit only one waiver request, to the DOT agency that regulated the largest number of its employees. The various DOT agencies involved would coordinate internally before the lead agency responded to the employer.

The Department intends to grant waivers only to employers who present a sound factual basis for their request and will have in place a number of provisions to protect employees' legitimate interests. The final rule (§ 40.21) lists several types of information that the employer would submit to the DOT agency in support of its request. This information is intended to give the DOT agency a picture of the employer's organization and safety situation. For example, the size or structure of the organization may affect the ability of an employer to carry out confidentiality requirements for the grant of a waiver. An organization that has an in-house MRO may be in a better position to control access to testing information than one that does not. An organization that stands employees down for reasons other than substance abuse testing may be in a better position to safeguard confidentiality than one that does not. Organizations' drug and alcohol testing history may be a relevant factor in determining whether stand-down is useful in a particular company.

None of these kinds of information is intended to establish a litmus test for granting a waiver. DOT agencies will make a case-by-case decision about the merits of a stand-down petition with respect to each company that applies for one. DOT agencies will respond to each petition in writing, with reasons for the decision. DOT agencies are intended to have wide discretion in making these judgments. For example, two companies might present stand-down policies that are nearly identical on paper. However, contextual factors in one company may make its confidentiality assurances credible as a practical matter, while in the other case may suggest that confidentiality could not practically be maintained, despite the company's good faith efforts. DOT agencies could make different decisions in the two cases. We also point out that petitions for waivers

will be considered on a company-by-company basis. DOT agencies will not, for example, consider a petition from a trade association or C/TPA on behalf of an industry or segment of an industry.

As a condition for receiving a waiver, the rule requires the employer to submit its proposed written stand-down policy. These requirements pertain to confidentiality and protection of legitimate employee interests and are described in greater detail in the discussion of § 40.21 below. One of these requirements is that an employer must continue to pay a worker who is in stand-down status, in the same way it would have in the absence of stand-down. This is a matter of fairness. To assume that the employee's test will be verified positive is to fall into the trap of presuming the employee guilty until proved innocent. In addition, continuing normal pay status for the employee should not be a major burden for employers, given the usually short interval before verification is completed. As a major employer association commented, most employers would not object to paying the employees for a reasonable amount of stand-down time if they believe they will gain a substantial safety benefit. An employer who articulated a safety rationale for stand-down but who objected to paying employees in the brief interim would seem to be an employer reluctant to expend resources commensurate with its expressed commitment to safety.

These conditions are intentionally stringent. The Department wants to ensure that only employers who are able to maintain a successful balance between the potential safety benefits of stand-down and the legitimate privacy interests of employees are permitted to operate a stand-down policy. A DOT agency can impose additional conditions on a waiver or, if necessary, revoke a waiver it once granted. A DOT agency could also take enforcement action against an employer that violated the terms of its waiver.

Some comments suggested that stand-down be permitted for confirmed laboratory tests for some drugs (*e.g.*, PCP) but not others (*e.g.*, opiates), based primarily on the lower or higher probabilities of verified negatives for these substances. The Department is not including such a provision as a general matter, out of concern that such a provision might lead to confusion.

Public Interest Exclusions (PIE)

The NPRM proposed that service agents—persons and organizations that provide drug and alcohol testing services to employers, such as laboratories, MROs, substance abuse professionals (SAPs), collectors, breath alcohol technicians (BATs), screening test technicians (STTs), consortia and third-party administrators (C/TPAs)—should be accountable for serious noncompliance with Part 40. The NPRM proposed a mechanism based on the Department's existing non-procurement suspension and debarment rules (49 CFR part 29). This mechanism would permit the Department, following a series of procedures designed to ensure fairness, to impose a public interest exclusion (PIE). A PIE would direct DOT-regulated employers not to use the service agent for a period of time. The Department proposed to use this mechanism only in cases of serious misconduct where the service agent has not implemented prompt corrective action following notice by a DOT agency. The preamble noted that this mechanism rested on the Department's existing authority to establish requirements for the conduct of the drug and alcohol testing process and to direct employers to use only products and services that met these standards.

Comments

The PIE proposal generated a good deal of comment. Almost a hundred written comments to the docket addressed the proposal, which was also the subject of extended discussion at the Department's three listening sessions, where the Department convened forums specifically on the subject. A strong majority of employers and all unions addressing the proposal favored it. Among service agents and their organizations, and other commenters submitting written comments, about 60 percent opposed the proposal, as written. Some service agent commenters urged postponing consideration of the provision and addressing it in a separate rulemaking.

Even the commenters who opposed the proposal said that they believed service agents should be accountable for their conduct, at least in principle. Their reasons for opposing the proposal included doubting the need for such a mechanism and the Department's authority to implement it, a belief that the proposed process was insufficiently defined and did not provide enough procedural safeguards for service agents, a concern that DOT auditors and inspectors might initiate PIE proceedings arbitrarily, a preference for other alternatives (*e.g.*, additional industry standards, certification, training programs, litigation), or support for other options mentioned in the preamble to the NPRM (*e.g.*, certification or self-certification by all service agents with a DOT decertification process).

Proponents of the proposal cited examples of misconduct by service agents for which there was no present remedy. They said that employers, especially small employers, often had to take on faith the quality of service agents, and the PIE process could help them to know which service agents to avoid. Employers also believed that it was unfair for them to be solely accountable for serious problems in the testing process. Service agents who supported the proposal said that it would enhance the overall quality of performance by service agents. Some service agents cut corners to reduce costs, putting more conscientious service agents at a competitive disadvantage, these commenters said, and then ''whined'' when the Department proposed a meaningful accountability mechanism.

Commenters had a number of thoughts on specific aspects of the proposal. Many asked for greater specificity concerning the kinds of ''offenses'' that would lead to a PIE proceeding. DOT staff pointed out, during the listening sessions and in writing, that the PIE mechanism was intended, both for policy and resource reasons, to be used only in the case of ''egregious'' misconduct. However, commenters pointed out that this statement was not made in the proposed regulatory text. They feared that differences in interpretation among inspectors and other DOT staff could lead to the inconsistent or arbitrary use of PIE proceedings. Some of these commenters desired a specific list of the actions that would lead to a PIE proceeding, while others suggested the Department should at least provide examples.

Another frequently-made comment concerned the scope of PIEs. The NPRM said that a PIE would apply to all divisions, organizational elements, and types of services provided by a service agent, unless the ODAPC Director decided to limit its scope. Affiliates and individual officers and employees could also be subject to a PIE. A number of service agents and employers objected to this aspect of the proposal, saying it was too broad. It was unfair, they said, to prohibit employers from using a service agent's other services because of a problem in one area. If a TPA has violated the rule with respect to MRO services, for example, why should a PIE prevent an employer from using the TPA for collection or SAP services? Many commenters who made this point favored an approach that came to be known, in the listening sessions, as the

''slice of PIE.'' Under this approach, a PIE would apply only to the type of service in which noncompliance had taken place. Some commenters said the ''slice'' should be even narrower, applying only to the specific employer, facility, or individual service agent staff members who had been involved in the noncompliance. A few laboratories said that laboratories should not be subject to the PIE process, since HHS already regulates laboratories through its certification process. Another commenter thought that it would be better to fine erring service agents rather than issuing a PIE.

Commenters raised two issues concerning the role of the ODAPC Director in the PIE process. A few service agents suggested that the Director would not be an objective decisionmaker, because he or she would be too sympathetic to the position of DOT staff. Others suggested that the ''firewall'' between the Director and other staff be made more explicit in the regulatory text. Several service agent commenters also asked for criteria for determining the length of a PIE, as well as a regulatory time frame for the Director's consideration of a service agent's petition to lift a PIE.

Smaller numbers of commenters suggested other procedural changes in the PIE provisions. One recommendation was that the initiating official's burden of proof be ''clear and convincing evidence'' instead of a preponderance of the evidence. Others asked for specific rules of evidence to apply to PIE proceedings. Some asked that the Department contact the service agent first, to check on alleged facts, before initiating a proceeding. A number of employers asked for periods longer than the proposed 90 days to replace a service agent that was subject to a PIE, or for the possibility of extensions of that period. Some service agents asked to delay the effective date of the PIE provision by a year or two, to give organizations time to get used to the requirements of the new final rule. A commenter asked that the rule provide for a private right of action by employers against service agents. Other commenters disagreed with the statement in the proposed rule text that the purpose of a PIE was not punishment.

DOT Response

1. Basic Rationale for the PIE Provisions

Service agents perform the bulk of drug and alcohol testing services for transportation employers. Employers, particularly small employers, necessarily rely on service agents to comply with their testing obligations. These employers often do not have the expertise in testing matters that would enable them to evaluate independently the quality, or even the regulatory compliance, of the work that service agents perform for them. Yet an employer's compliance with DOT regulations is largely dependent on its service agents' performance. If a service agent makes a serious mistake that results in the employer being out of compliance with a DOT rule, the employer alone is now accountable. The employer may be subject to civil penalties from a DOT agency. The employer can be subject to litigation resulting from personnel action it took on the basis of the service agent's noncomplying services. Most importantly, the employer's efforts to ensure the safety of its operations may be damaged, as when an employee who apparently uses drugs is returned to duty because of a service agent's noncompliance. In many cases, there are now no consequences to a service agent who creates such problems, even if the problems are serious.

The experience of DOT agencies, which are responsible for reviewing employers' compliance, is that the vast majority of employer noncompliance results from service agent errors. (Given the pervasive role of service agents in performing testing functions, this is probably not a disproportionate effect.) FAA staff informally estimate, for example, that more than nine out of ten deficiencies their inspectors discover result from service agent errors. In addition, the Department's drug and alcohol testing office staff, from time to time, encounter serious noncompliance with DOT rules by service agents, for which there is no present remedy. Here are a few examples of actual cases we have encountered:

- An MRO verified many tests positive without conducting verification interviews. As a result, the tests had to be cancelled, and the employer had to return the employees to duty, incurring extra safety risks and costs.
- Another MRO, who had counterfeit medical credentials, verified several tests positive, bringing into question the integrity of the verification process.
- In defiance of the clear language of Part 40, a letter from the Department, and a finding by a court, a laboratory refused to provide an employee information to which she was entitled.
- A service agent made false claims that its personnel were certified by DOT. DOT wrote them a letter telling them to stop. Years later, the same service agent's letterhead continues to make the same claims.
- A consortium and a laboratory were engaged in a billing dispute with one another. As a result, numerous pre-employment results were not transmitted to employers for a number of months. No one informed the employers of the problem, and some of the employers, in the apparent belief that ''no news is good news,'' placed some of the workers—including one who tested positive—in safety-sensitive positions.
- A major employer used a service agent for SAP services. The SAPs provided by the service agent established a long-standing pattern of returning virtually all employees who have tested positive to work quickly, without education or treatment.
- Personnel of a major laboratory engaged in misconduct apparently involving the backdating and attempted destruction of documents relevant to litigation concerning a drug test result.

Attempting to deal with service agent problems one employer at a time is both inefficient and potentially unfair. It is inefficient because service agents work for many employers. It is potentially unfair because employers may be unwitting victims of service agent misconduct. Conducting civil penalty proceedings against several employers because of the actions of one service agent, moreover, does little if anything to correct the conduct of the service agent or protect other employers from the consequences of its noncompliance. In addition, service agents often work for employers in more than one transportation industry. For example, if FRA takes action with respect to a railroad whose noncompliance is caused by service agent errors, this does nothing to protect a motor carrier who uses the same service agent.

The Department believes that, in this situation, an accountability mechanism that protects the public interest, employers, and employees is appropriate and necessary. A few commenters appear to have misunderstood the nature of the PIE proposal. It is not an assertion of new regulatory authority over service agents. It makes use of the Department's long-standing authority to direct transportation employers not to use products and services that do not meet Federal standards. Employers may not use laboratories that are not HHS-certified. They may not use evidential breath testing devices (EBTs) that are not on the National Highway Traffic Safety Administration (NHTSA) conforming products list (CPL). They may not use SAPs and MROs who fail to meet regulatory qualifications. There is no difference in legal principle

between these well-established prohibitions and a requirement not to use a service agent who has been found to have seriously noncomplied with Part 40. A PIE is simply one additional directive to transportation employers to ensure that the employers use only service providers that meet regulatory requirements.

Procedurally, the PIE process is modeled on a well-established procedure for handling non-procurement suspensions and debarments. While not identical to the non-procurement suspension and debarment rules of the Department (49 CFR part 29), the PIE process draws on Part 29 for many of its details. Modeling PIE on an existing program that affords due process to participants ensures that PIE will be an effective and fair approach to serious noncompliance in the drug and alcohol testing program.

2. Legal Authority

The Department looked carefully at the issue of legal authority before proposing the PIE process in the NPRM. As noted in the preamble to that document, there is ample legal authority to implement this proposal. First, there is specific statutory authority for rulemaking in this area. Section 322 of the DOT Act provides general rulemaking authority to the Secretary of Transportation. It states that ''[t]he Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary.'' Further, the 1991 Omnibus Act authorizes the Secretary of Transportation to continue in effect, amend, or further supplement regulations governing the use of alcohol or a controlled substance. See 49 U.S.C. 31306(i), 49 U.S.C. 20140(f), 49 U.S.C. 5331(f)(3), and 49 U.S.C. 45106(c). Upon review of the Act, it is clear that Congress—while not explicitly mentioning a particular mechanism to ensure compliance—intended the Secretary to use his or her discretion to devise appropriate regulatory methods to carry out the Department's drug and alcohol testing responsibilities.

Moreover, under well-settled case law, specific statutory authority is not needed in order for an agency to have authority to impose a reasonable requirement. There are many court decisions that support this point, particularly cases following *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* stands for the proposition that courts will defer to ''permissible'' agency interpretations where the statute is ''silent or ambiguous''. In *Chevron*, the leading case on the regulatory and interpretive authority of agencies, the Supreme Court articulated the following standard:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (*Id.* at 842–43).

Numerous cases have reaffirmed this standard. When courts have applied the *Chevron* analysis to strike down an agency regulation or interpretation, they have not done so on the basis that a statute did not speak to the issue at hand. Rather, they did so because something in the statute specifically precluded the action the agency had taken. It is clear that nothing in the Department's statutes precludes the Department from instituting a procedure like PIE.

To the contrary, the most important statute authorizing the DOT drug and alcohol testing program, the Omnibus Transportation Employee Testing Act of 1991, confirms the Department's broad authority to carry out its drug and alcohol testing responsibilities. Congress intended that the Secretary use his or her discretion and issue supplementing regulations when necessary to carry out the Department's drug and alcohol testing responsibilities.

The DOT agency drug testing regulations and Part 40 were originally adopted in 1988–89 without any specific statutory authority. These rules were based on the DOT agencies' general safety rulemaking authority and the Department's general rulemaking authority. These DOT agency safety statutes are silent with respect to drug and alcohol testing. They do not describe drugs to be tested, types of tests, random testing rates, laboratories, medical review officers, return-to-duty procedures, testing equipment or personnel, or any of the other subjects addressed by DOT agency substance testing rules and Part 40. Before the Omnibus Act, these statutes provided the only authority for the DOT agency drug testing rules, and they still provide the only authority for the RSPA and Coast Guard rules. There was never any question—aside from the original transit rule—about the authority of the DOT agencies to issue these rules. When plaintiffs challenged these rules, they and the courts focused on the constitutional issues, mentioning the agency's authority for the rules only in passing, since it was so clear.

Under *Chevron*, when the intent of Congress is clear, as is the case here, no further inquiry is necessary. This makes it unnecessary for any reviewing court to move on to the second prong of *Chevron*. If a court did examine the PIE provision under the second prong however, there is little doubt that the Department's action is based on a permissible construction of the statute. The Department 's decision to facilitate employer compliance and protect employers and employees from the consequences of services that are inconsistent with regulatory requirements is reasonable. Each of the requirements of Part 40 is important to ensure the accuracy, integrity, privacy and fairness of the testing process as well as the safety of the public. If a service agent fails or refuses to meet these requirements, then these important interests are adversely affected.

As the testing program and the role of service agents have evolved over ten years, the Department has learned that additional measures are needed to ensure the proper provision of testing services to employers. In every respect, the proposed PIE process comes squarely within the range of agency actions which courts, applying *Chevron*, have approved.

3. *Alternatives*

The Department believes that efforts by industry groups to establish certification programs, training programs, and industry standards are laudable and helpful. Such efforts, however, do not address the issue of accountability for service agents whose noncompliance is serious. These programs cannot respond, in a legally binding way, with real consequences, to protect employers and employees from the misconduct of a party who makes serious errors or chooses to noncomply to gain an economic advantage.

An accountability mechanism like that proposed in the NPRM would effectively complement voluntary industry efforts. By attaching tangible consequences to serious noncompliance, an accountability mechanism would assist industry groups in getting service agents to take certification, training, and industry standards programs seriously.

Some commenters favored one or more of the options discussed in the NPRM preamble, such as certification or self-certification followed by a DOT decertification procedure or a contract-based mechanism. With respect to the contract mechanism, comment was, however, very divided, with many commenters (in response to the PIE proposals or proposed § 40.11) saying that the contract clause requirement was too burdensome or ineffective (*i.e.*, with respect to parties who typically do not have written contracts). The Department does not have the resources to operate a Department-wide active certification program (especially with respect to the motor carrier industry). Maintaining a data base for a self-certification program would be difficult for the Department, and there are significant issues concerning keeping such a data base up to date. For these reasons, we do not believe that these options are preferable to the PIE provisions the NPRM proposed.

A few commenters supported reliance on the legal system (i.e., court litigation) as a tool for employers to use to address problems caused by service agent noncompliance. Nothing prevents employers from resorting to private litigation now or in the future. By nature, however, such private litigation focuses on vindicating the private interests of the employer involved, not in more broadly protecting testing program participants and the public interest. For this reason, we do not view private litigation as a substitute for the PIE provisions.

4. How Does a PIE Proceeding Begin?

Many service agent commenters asked for greater clarity and specificity concerning what ''offenses'' would be sufficient to warrant starting a PIE proceeding. They expressed the concern that the NPRM proposal would give DOT officials, including auditors and inspectors, too much discretion to start PIE proceedings based on minor problems, despite the Department's statements that PIEs were intended to be used in cases of ''egregious'' noncompliance.

As DOT officials said during the listening sessions in PIE roundtables, we do not think it is a good idea to have a definitive list of offenses that would trigger a proceeding. The Department's experience with this program suggests that new situations will always arise. We cannot possibly specify them all at this time. A list that appeared definitive could lead to arguments that the Department was precluded from starting a PIE proceeding because the underlying conduct was not on a regulatory list.

Nevertheless, the Department does believe it would make our intent and policy clearer to state in the regulatory text that this process is intended to be used only for serious noncompliance. We provide several examples of the kind of noncompliance that would, as a policy matter, have a level of seriousness sufficient to warrant starting a PIE proceeding. This regulatory text provision also states that the list is not exclusive or exhaustive: we retain the discretion to start PIE proceedings in situations not on the list and we are not required to start a PIE proceeding every time something on the list comes up.

We also make clear that not everyone with a DOT ID card is authorized to start a PIE proceeding. Only certain officials, such as DOT agency drug and alcohol program managers, are authorized to do so. They may rely on credible information from any source, including but not limited to DOT auditors and inspectors, as the basis for starting a proceeding. As several commenters requested, the final rule text provides that the initiating official must contact the service agent to get its side of the story and any facts it can provide before taking further action, such as issuing a correction notice or a notice of proposed exclusion (NOPE).

One issue on which commenters spoke concerns the relationship of the PIE process and the HHS certification process for laboratories. With respect to matters on which HHS takes certification action against a laboratory, the Department would defer to the HHS action. That is, as a policy matter, the Department would not start a PIE action is HHS had already taken a certification action against a laboratory on the same matter. We do not believe it would be an economical use of resources to have two Federal proceedings in progress with respect to the same laboratory, on the same issues, at the same time. However, if DHHS decided that it was not appropriate to begin certification action (*e.g.,* because the laboratory's conduct did not trigger the HHS ''imminent harm'' standard), DOT could consider whether to begin a PIE proceeding.

One of the concerns that some commenters expressed was that the very existence of a PIE proceeding, regardless of its ultimate outcome, could have adverse economic effects on a service agent. They asked that such proceedings be kept confidential. The Department does not believe that it is possible to keep a PIE proceeding, or the events leading up to it (*e.g.,* a factual inquiry, a correction notice) secret. For example, in seeking to establish whether there is a factual basis for a PIE proceeding, DOT personnel might well have to ask questions of a number of employers about the service agent's activities. On the other hand, the Department will not affirmatively seek to make pending proceedings public knowledge, prior to the issuance of a NOPE. For example, we do not intend to issue a press release or make other kinds of public announcements at the time that we send a correction notice to a service agent. The issuance of a NOPE and the Director's decision, however, are matters of public record.

5. Scope of PIE Proceedings

Section 40.379 of the NPRM proposed that a PIE would apply to all the divisions, organizational elements, and types of services provided by the service agent involved, unless the Director limited the scope of the proceeding. Under some circumstances, affiliates and individuals could also be subject to a PIE. Many service agent commenters thought the scope of a PIE should be narrower, limited to a particular type of activity, affected employer, etc.

The intent of the PIE proposal is to protect the public from the misconduct of an organization. Allowing the organization to segment its activities, and contend that the public should be protected only from some of what it does, is contrary to this objective. Nevertheless, the Department believes that it is appropriate to decide, on a case-by-case basis, whether a compliance problem is limited to one facet of a service agent's activities or pervades the service agent's organization. The Department is therefore making a procedural change from the NPRM. Instead of saying that a PIE would apply to everything a service agent does, the final rule makes the scope of the PIE an issue in the proceeding.

That is, the initiating official would propose a scope for the proposed PIE, depending on that official's view of how pervasive the noncompliance was in the service agent's organization. It might be one activity or organizational element; it might be more than one; it might be the totality of the service agent's activities. The service agent could contest the initiating official's scope proposal, and the Director would make an explicit decision about scope. This is not quite the ''slice of pie'' proposal advanced by some service agents, since the Department would not necessarily be limited by rule to applying a PIE only to the type of activity or organizational element directly involved in the noncompliance. But the initiating official would have the burden of persuading the Director that the

proposed scope of the PIE was appropriate in light of the facts of the case. The final rule text provides several examples to illustrate the way this scope procedure is intended to work.

6. Procedural Issues

Like the NPRM, the final rule requires initiating officials to send a correction notice to a service agent before starting a PIE proceeding. This notice gives the service agent 60 days to fix a problem or change its procedures before a more adversarial process begins. We have added greater specificity concerning the NOPE that begins a PIE proceeding (*e.g.,* specifically requiring information on the proposed scope and duration of the PIE).

We believe that the ODAPC Director is the appropriate person to make decisions in PIE cases. The ODAPC Director is someone who is knowledgeable about the DOT program and regulations but who is not directly involved in their enforcement by the DOT agencies. We disagree with contentions that the Director is inherently biased in potential PIE matters. It is the Director's job to consider such matters fairly and in accordance with the Department's rules, and nothing in the comments persuades us that the Director will be unable to do the job right.

To reassure participants further about the objectivity of the process, we have added language to the final rule specifically prohibiting the ODAPC Director from playing any role in the initiation of a PIE and establishing a ''firewall'' between the initiating official and the Director. This firewall would prohibit any *ex parte* contacts between the two. In any situation in which it would be inappropriate for the Director to act as the decisionmaker (*e.g.,* the Director had recent professional ties to the service agent who was the subject of the PIE proceeding, the Director has had substantial involvement in a matter before it becomes the subject of a PIE proceeding), the rule the Director would designate another person to decide the case. In addition, the final rule lists the elements of the Director's decision, including not only the basic decision about whether to issue a PIE but also decisions about disputed matters of material fact, the scope of a PIE, and the duration of a PIE.

The standard of proof in a PIE proceeding will remain ''the preponderance of the evidence.'' There is no policy or legal basis apparent for raising this burden to the higher ''clear and convincing evidence'' level. Contrary to a few comments, there is no ''presumption of guilt'' on the part of a service agent in a PIE proceeding. The initiating official bears the burden of proof. Administrative proceedings in many kinds of matters, including suspension and debarment proceedings under Part 29, are conducted informally, without formal rules of evidence of the kind used in the court system, with evidence accepted on a general relevance standard. The final rule makes clear that PIE proceedings will be conducted in this way.

The Department takes no position on whether Part 40 creates a private right of action, deferring to the courts or to DOT agency regulations on this issue. While the Department recognizes that a PIE will have adverse consequences for a service agent, we continue to believe that the purpose of a PIE is to protect the public interest, not punishment. This language, which is derived from Part 29, is an accurate statement of the intent of the PIE provision and we are retaining it. A few commenters asked for a time frame for PIE decisions by the Department. We have responded by saying that the Director will generally make a decision within 60 days of the completion of the record in the case, though the Director can extend this period for good cause.

Some commenters requested additional clarification of the standards for determining the duration of a PIE. In response, we have added a new section listing examples of the kinds of factors that the Director will consider in determining the appropriateness, scope, and duration of a PIE. Since the proposed duration of a PIE is one of the elements of a proceeding that service agents can contest, service agents and initiating officials will have the opportunity to refer to these factors in their arguments about duration. In general, we say in the final regulatory text that a PIE stays in effect for one to five years. In deciding on the duration of a PIE, the Director will take into account the seriousness of the noncompliance and other factors listed in the rule. Nine months after the Director issues a PIE, the service agent can apply to the Director in writing to terminate or reduce a PIE. The rule spells out the grounds for such a request.

As noted in the **Effective Dates** section of the preamble, the Department is making the PIE provisions of the rule 30 days from the date of publication. The effect of this action is to make PIE proceedings available to the Department with respect to noncompliance with the existing Part 40 rule between the publication date of this revision and the August 1 effective date of the complete revised Part 40. We are doing so in order to emphasize to service agents that they are accountable for their actions. In some recent instances (*e.g.,* the apparent laboratory evidence tampering incident referred to in ''Basic Rationale for PIE Provisions'' above), the Department would have had grounds for considering the use of PIE proceedings, had they been available to us.

Return-to-Duty Process

The NPRM raised a number of issues surrounding the return-to-duty process. We proposed to consolidate this material in Part 40. One issue concerned the minimum number of follow-up tests that SAPs should prescribe. Should there be an increase over the current rule's requirement of six tests over the first 12 months following an employee's return to duty (*e.g.,* to 12 tests over one or two years)? Another issue was ''aftercare.'' That is, SAPs often make recommendations for continuing assistance after the employee returns to work. The NPRM proposed that employers would have to monitor employees' compliance with these recommendations. A third issue was whether SAPs should routinely receive drug test quantitations.

Comments

Comments from a mixture of employers, employees, and service agents directly addressed the question of whether the Department should increase the minimum number of follow-up tests. A substantial majority of these commenters opposed any change in the current requirement of a minimum of six tests over the first year following the employee's return to duty, and a few of these suggested reducing that minimum. These commenters did not oppose retaining the SAP's discretion to prescribe a higher number of tests or testing that went beyond the first year. Some additional commenters said that number of tests should be determined at the SAP's discretion, or in negotiation between the SAP and employer. On the other hand, a few commenters favored increasing the minimum to 12 tests.

With respect to aftercare, several motor carriers and motor carrier associations opposed the proposal for employers to monitor employee compliance with SAP recommendations. They said it would be too burdensome and went beyond their expertise, which centered on running trucks, not aftercare. A few service agents supported the proposed change. There was also concern expressed, principally in discussions at the listening sessions, that some SAPs were reluctant to recommend assistance

even after employees tested positive, whether out of over-reliance on employee's excuses, claims that the testing process was flawed, or the SAP's personal opinions about the justification for or utility of the testing process. Some commenters asserted that the very fact of a violation showed that an individual was in need of some education or treatment, so it was inconsistent with the purpose of the rules to permit SAPs to find that an individual was not in need of assistance.

Commenters were divided on the issue of whether SAPs should routinely receive reports of the quantitation of drugs in the specimens of individuals who tested positive. Those who favored this approach, including most of the employers who spoke to this issue and some of the SAPs, said that it would be useful to know the levels of drugs in the employees' specimens. This would be helpful to SAPs as they try to evaluate an employee's situation and determine what sort of treatment was appropriate. The majority of commenters opposed providing this information on a routine basis, saying that the quantitation of drugs in a specimen was usually irrelevant to evaluation and treatment and could sometimes be diagnostically misleading. Testing was never intended to diagnose addiction, and urine test quantitations rarely provide a good basis for evaluating an employee's drug problems. A laboratory added that requiring laboratories to report this information to SAPs would be burdensome.

DOT Response

With respect to follow-up tests, the Department has decided that it is not necessary to increase the minimum number. We believe that follow-up tests are very important. They are the best tool we have to make sure that an individual who has returned to duty after a violation remains in compliance while experiencing the actual stresses and temptations of the work environment. However, requiring a greater number of tests could be unnecessarily burdensome in those cases in which SAPs are satisfied that six tests are sufficient. We will keep in place the basic provisions of the existing rule: a minimum of six such tests in the first year of safety-sensitive work following the employee's return to duty. SAPs will continue to have discretion to require a greater number of tests over a period of up to 60 months, as in the current rule.

The Department has become convinced that there is no basis for a SAP ever determining that an individual who has tested positive or otherwise violated the drug and alcohol rules does not need education or treatment as well as follow up testing. For someone who performs safety-sensitive transportation functions, the very fact of a violation indicates a disregard of safety that must be addressed, corrected, and monitored in order to ensure safe performance of those functions in the future. Therefore, the final rule will require the SAP to mandate some level of assistance in every case, as well as to prescribe at least the minimum number of follow-up tests for each employee who returns to duty following any violation of the rules. We also clarify that the SAP must present a copy of his or her written follow-up testing plan to the designated employer representative (DER). The rule text also cautions SAPs against basing any decisions, even in part, on employee claims of flaws in the testing process or any private opinions of the SAP about the validity or utility of the testing process.

In response to comments, the regulation clarifies that the follow-up testing requirement follows the employee from one job to another and persists through a break in service. That is, if after returning to duty with an employer, the employee changes jobs before completing all required follow-up tests, the employee is responsible for completing the follow-up tests with his or her new employer. Likewise, if the employee returns to work, is laid off for several months, and then comes back to work with the same employer, the employee must complete the series of follow-up tests ordered by the SAP.

With respect to employer monitoring of aftercare, the Department is persuaded by the objections of employer commenters that we should not require employers to take on this task. SAPs have the obligation to make recommendations for aftercare where they believe such assistance is needed to maintain sobriety or abstinence from illegal drugs. These recommendations should carry a good deal of weight, because they in effect declare that employee compliance with them is important to ensure safe performance of safety-sensitive functions. The rule states the employee's obligation to comply with these recommendations.

Rather than requiring employer monitoring, however, the rule provides the employer discretion to take a variety of steps. These could include putting compliance with SAP recommendations into return-to-duty agreements, disciplining employees for noncompliance, and using the services of SAPs or employee assistance programs (EAPs) to assist and monitor employees' aftercare activities. The rule notes that employers can choose to monitor these activities, and that employees who fail to carry out the recommendations can be subject to sanctions from their employers. We note that this discussion concerns employer discretion with respect to aftercare (*e.g.,* treatment and education) activities only. Employers do not have discretion with respect to follow-up tests. Employers must carry out the follow-up test instructions they receive from SAPs.

The Department believes that the commenters who opposed routinely providing drug test quantitations to SAPs have the better of the argument. SAPs take a variety of factors—including a face-to-face interview with the employee—into account when determining what assistance the employee needs. The amount of a particular drug in an employee's specimen at a particular time does not determine what sort of treatment is most appropriate for the individual. Consequently, we will not provide for quantitations to be given to SAPs on a routine basis. We do provide, however, that SAPs can consult with MROs (who must cooperate with SAPs) and receive information that the MRO has gathered as part of the verification process. Through this process, SAPs can get additional information that may be of use to them in the evaluation process.

We want to emphasize that neither the rule nor the Department requires employers to fire employees who violate the Department's drug and alcohol testing rules. There is no national policy, and certainly no policy articulated by the Federal government, that commands this result. We would not have this detailed return-to-duty procedure if we believed that no one should be returned to duty after a violation.

As has been true from the beginning, all the Department requires is that an employee who violates the rule not perform safety-sensitive functions until and unless he or she successfully completes the return-to-duty process. Decisions about discipline and termination are left to the discretion of the employer or labor-management negotiations. Where employer policy, or labor-management negotiations, have delegated personnel decisions of this kind to an arbitrator, the Department intends that the arbitrator's decision determines the personnel action that the employer takes. The Supreme Court has recently affirmed these principles. *Eastern Associated Coal Corporation* v. *United Mine Workers of America, District 17, et. al,* 531 U.S. ____ (2000).

Of course, an arbitrator cannot order an employer to return an employee to

the performance of safety-sensitive functions until the employee has successfully completed the return-to-duty process. Nor can an arbitrator or an employer change the laboratory's findings about a specimen or an MRO's decision about whether there is a legitimate medical explanation for a test result.

Collector Training

Competent performance of drug and alcohol testing functions by collectors, BATs and STTs, MROs, SAPs and others involved in the testing process is obviously very important to the integrity and fairness of the Department's program. The Department's NPRM asked questions and offered proposals for the training and qualifications of these personnel. This discussion focuses on collector training, which was the subject of more comment than training for other personnel. Training and qualifications for other personnel are discussed in the section-by-section portion of the preamble.

Comments

Training for collectors in the drug testing program was the subject of comment from a wide variety of parties, including service agents, employers, and unions. Commenters differed on most of the subjects under discussion, including the basic point of the extent of current problems in the collection area. Most commenters on the subject believed that collections were the weakest point of the testing process, though some argued that there was a low rate of collection errors in their experience. Some commenters said that it would reduce collection errors if the Federal Custody and Control Form (CCF) were simplified.

Some commenters favored a formal instruction course for collectors, like the Department's BAT course. Most of these and some other commenters opposed the notions of self-instruction and self-certification for collectors, saying that they were meaningless. They believed that there should be some sort of formal training, with an examination or other means of ensuring that a collector deserved to be certified. Some commenters also supported a ''train-the-trainer'' course requirement to certify trainers.

Other commenters, however, opposed any formal training requirements for collectors, saying it was expensive, burdensome, and might make it harder to find collectors, especially in less densely populated areas. A maritime employer group asked for some exceptions to training requirements for people who were not regularly collectors but might occasionally have to conduct a collection, as in a post-accident situation.

Commenters who thought the NPRM's training proposals were too extensive often objected to requirements for classroom training or other training modes involving a live instructor or monitor. They said the requirements should be more flexible, and provide for training through such approaches as videos, internet-based courses, or instruction and monitoring through telephone or interactive computer methods.

A number of commenters objected to the term ''sufficiently knowledgeable,'' which the NPRM used to describe the personnel who trained collectors. The commenters said the term was too vague. Some of these commenters asked that the rule include more specific qualifications for trainers. Some commenters also objected to the proposal that trainees be required to complete five error-free mock collections, saying that the requirement was either too burdensome (some suggested the number of mock collections be reduced) or insufficient. Some commenters also took issue with the requirement that a collector who made a ''fatal flaw'' mistake should have to be retrained, particularly since they felt it might threaten the validity of subsequent collections the collector conducted prior to the retraining. Others thought it would be better to have a slower trigger for the retraining requirement (*e.g.,* two fatal flaws in two years).

DOT Response

The Department believes that making collector training more effective will be an important step in reducing errors in the drug testing process. The collection of urine specimens is the step in the process with the greatest potential for administrative error, and our own experience confirms the comments of persons who said that collections are a fertile source of mistakes. When our inspectors and program personnel visit collection sites in the field, they commonly find a wide variety of mistakes and misunderstandings in the collection process. We also agree that self-certification is inadequate. For these reasons, we will require additional training of collectors, compared to the present rule. We believe that this training should be provided in as flexible a manner as possible. Section 40.33 contains the Department's resolution of collector training issues.

Part 40 contains much information about how collections must be conducted. It is essential that collectors become knowledgeable about the relevant portions of the new Part 40, DOT collections guidance and relevant DOT agency rule provisions, and we will require them to do so. We also believe that more formal training is needed to ensure that collectors understand and can carry out the requirements of this part. We believe that, as commenters noted, the training can be provided in a number of ways (*e.g.,* classroom sessions, videos, internet courses). We are not prescribing a particular curriculum as we have for alcohol testing personnel, and we will not require that collectors be ''certified.'' By taking this approach, we achieve the objective of additional training while allowing flexibility and minimizing costs. In-person involvement of a trainer is not required for this part of the training process.

To demonstrate that they can practically apply what they have learned, collectors must conduct five consecutive error-free mock collections. We believe this is an extremely important requirement, because collectors must deal with real people and real specimens in their job, not just regulatory text or computer simulations. By mock collections, we mean collections that are not real collections of employees subject to testing under DOT regulations. The five collections must include both uneventful and ''problem'' testing scenarios. Another person must monitor and evaluate the mock collections to ensure that they are error-free. This part of the process does involve the in-person participation of someone to monitor and evaluate the trainee's performance (unless some technology is used that permits the real-time, step-by-step observation and evaluation of the trainee's performance without a person in the same room with the trainee).

The monitor must be someone who has demonstrated necessary knowledge, skills, and experience (1) by regularly conducting DOT drug test collections for a period of at least a year, (2) by having conducted collector training under this part for a year, or (3) by successfully having completed a ''train-the-trainer'' course. The Department sets out these alternatives for qualifying as a trainer in response to comments that said ''sufficiently knowledgeable'' was too vague.

All new collectors must meet these training requirements. In addition, current collectors must meet the requirement within 2½ years after the effective date of this rule (December 2003). This will provide adequate time for current collectors to get the

necessary qualification training, if they have not already done so.

Collectors would have to get refresher training every five years. We believe that, just as other professionals in the drug and alcohol testing business need continuing education, it is important for collectors to brush up on the rules and techniques of their part of the drug testing process, in order to ensure that they perform at the highest level. This training would also focus on any changes in collection technology that had come into use in the meantime.

One of the most important occasions for training is following a mistake that actually results in a test being cancelled. This requirement does not apply every time there is a cancelled test, only when the cancellation is the result of the collector's error. The training would focus on the subject matter that was involved with the error, and would also involve three monitored error-free mock collections. This training would have to take place within 30 days of the collector's being notified of the error. The reason for this training is obvious: if someone makes a mistake once, we want to make sure he or she does not make a similar mistake again.

Commenters noted that it might be very burdensome for employers, or even some service agents, to keep training records for each of their possible many and widespread collectors. To avoid this problem, we are requiring that collectors (like other service providers) keep their own training records, which would have to be made available to employers, other service agents (*e.g.,* C/TPAs) involved with the collector's provision of services, and DOT. In addition, we specify in § 40.209 that a test is not invalidated because a collector has not fulfilled a training requirement. For example, suppose someone collects a specimen correctly but has not completed required training or retraining. The test would not be cancelled because the training requirement was not met, though the collector, other service agents, and employer involved might be found in noncompliance as the result of the failure to meet training requirements.

Transmission of Information Through Consortia and Third-Party Administrators

When the Department began the drug testing program in 1988–89, we had in mind a perhaps simplistic model of how the program would work. We imagined that most employers would have an in-house testing program that would perform most of the tasks the rules required, except that employers would contract directly with laboratories for specimen testing services and perhaps with MROs for medical review services. We thought that owner-operators and other very small employers might well band together in consortia to gain economies of scale in purchasing testing-related services.

The program has developed in quite different directions, to the point where most employers' drug and alcohol testing programs are outsourced, often operated by C/TPAs. These organizations often bundle their services to employers. Only a minority of employers, usually large ones, operate their own programs.

One of the Department's tasks in revising Part 40 is to make appropriate adaptations to the altered shape of the drug and alcohol testing business. We have no desire to stand as King Canute before the marketplace sea. Nor do we wish to surrender to purely economic considerations features of the program we regard as critical to its integrity. The goal of finding an appropriate balance has influenced our efforts in a number of areas as part of this rulemaking, including the functions of MROs and SAPs and the issue of how test results are reported to employers.

In the NPRM, the Department proposed keeping sharp lines of demarcation between different participants in the program. Specifically, we proposed putting into regulatory text the interpretation we have maintained under the existing rule with respect to the transmission of drug test results from MROs to employers. That is, MROs must report the results directly to employers. C/TPAs could not act as intermediaries in this process. This position was based on the premise that indirect reporting was likely to be slower, and more prone to error and compromise of confidentiality, than direct reporting.

Comments

The bulk of comments on this issue came from TPAs, who asserted that they should be permitted to act as intermediaries in the transmission of drug testing results. There were also comments from employers and unions, most of which supported the TPAs' position. During discussions of this issue in the listening sessions, DOT staff asked TPAs to address the question of how it was as or more efficient and effective to move a result from Point A (the MRO) to point B (the employer) through Point C (a TPA), rather than sending it directly from Point A to Point B. Many of the C/TPA comments did address this question.

A common response was that many MROs do not have the staff or electronic capability to receive, process, and transmit results to clients. Indeed, many smaller doctors' offices would find it burdensome to handle all the paperwork. It is more efficient division of labor to have doctors concentrating on medical review and TPAs on information distribution, some said. TPAs, commenters said, are set up to act as electronic transfer points for data, allowing for the more efficient and timely delivery of results. Requiring the MRO to transmit the results directly would increase rather than decrease processing time and add costs.

Commenters favoring change in this proposal also said that TPAs know the rules and regulations well, since this is their full-time business. Small employers find it easier to call one place—the TPA—for all drug program information rather than having to deal with a variety of sources. Some of these commenters noted that, in the Coast Guard program, TPAs had played this role successfully for some time. They said there was no evidence of any detriment to public safety in this case, or in other cases where TPAs (contrary to existing rules) have transmitted results.

Some MROs and TPAs disagreed with this point of view, citing concerns about delays, administrative errors, and risks to confidentiality. Commenters said that many MROs are fully capable of transmitting results information directly to employers, and that if an employer found that it was not receiving results in a timely fashion, it could change MROs. In addition, direct MRO transmission may provide greater value to employers, because MROs can answer questions about the result and help the employer resolve procedural issues.

Comment on this issue focused on MRO transmission of verified drug testing results to employers. However, many commenters mentioned other areas in which similar issues arise, such as laboratory transmission of results to MROs, transmission of SAP reports to employers, and transmission of alcohol test results from BATs to employers.

A related, but distinct, issue concerned who could appropriately play the role of the designated employer representative (DER). Some commenters said that C/TPAs should be able to act for employers as DERs, at least in small companies. Some of these comments alleged that the role of the DER was a complex, multifaceted one, and that it would be very costly, particularly for small companies, to hire a DER.

DOT Response

The Department is persuaded by the comments on this subject that C/TPAs

have the ability to transmit verified drug test results to employers as or more efficiently than MROs who transmit the information directly. While we understand, and to an extent share, concerns about potential delays, errors, and breaches of confidentiality when intermediaries are used, we do not have any evidence in the record that these problems actually occur in any significant way. The Coast Guard experience, as reported by commenters (including some employer and union commenters) and verified by Coast Guard staff, suggests that the parties concerned in that industry are satisfied with this approach.

Consequently, the final rule (see —40.345) gives employers the choice of receiving drug test results directly from the MRO or via a C/TPA. We emphasize that it is up to the employer—not the C/TPA—to make this choice. The employer can make this choice for any or all of the items listed in Appendix F (e.g., an employer may choose to receive some items via the TPA and others directly from an MRO). The rule authorizes C/TPAs to act as intermediaries in the transmittal of information to employers only with respect to the specific provisions of the rule listed in Appendix F. C/TPAs are prohibited from acting as an intermediary in transmitting information not listed in Appendix F.

For example, C/TPAs are not allowed to act as an intermediary who transmits laboratory test results to MROs , SAP reports to employers, or medical information from MROs to employers. In the case of the laboratory reports, we believe that the direct link between laboratories and MROs is critical to the timely and independent medical review of those results. (Certainly laboratories have the electronic capability to readily transmit results directly to MROs in a timely and accurate fashion.) With respect to SAP reports, we are concerned that using an intermediary creates the opportunity and temptation to alter the SAP's recommendations (a problem that DOT staff have noted in the current program). With respect to medical information, we believe this is confidential medical data that should not pass through an additional hand on its way from the MRO to the employer.

The discussion of this issue among commenters focused mainly, though not exclusively, on drug test information. A few commenters mentioned that similar considerations should apply to alcohol testing information. With respect to ''negative'' alcohol test results (i.e., results of less than 0.02), we agree. The same rationale that supports permitting drug testing information to be conveyed by C/TPAs applies to this information. However, we draw a distinction with respect to alcohol testing results of 0.02 or higher. These results—unlike positive drug test results or negative drug or alcohol test results—mean that an employee is, to some extent, impaired by alcohol. As a safety matter, the employer must immediately remove the employee from performance of safety-sensitive functions. This is a situation where time is of the essence, and we therefore will continue to require BATs to transmit these results directly to employers. C/TPAs are not authorized to act as an intermediary in this situation.

We believe that it is essential that someone employed by the actual transportation employer act as the DER. The DER's function is to receive information about certain kinds of test results and take required action, such as removing an employee from the performance of safety-sensitive functions. Someone who is an employee of a C/TPA, rather than of the actual transportation employer, is less well situated to perform these functions, especially since a C/TPA representative generally does not have line authority over a transportation employer's employees.

Much of the comment on this issue appears based on a significant misunderstanding of the role of a DER. A DER is not a drug and alcohol program manager. A DER does not need extensive knowledge about the DOT drug and alcohol testing program and need not spend extensive time on DER duties. The DER is simply someone who can act immediately to remove an employee from safety-sensitive functions, or take other appropriate action, upon receipt of information that the employee has violated the rules or needs to be subject to certain testing requirements. Particularly for small companies (e.g., a 3-10 driver trucking company), the DER is likely to perform this function on a collateral duty basis, fielding a rare phone call (i.e., there are not many tests per year and only a small percentage of tests result in violations) and removing an employee from safety-sensitive functions on those occasions. This is not a time-or resources-intensive activity, and it would certainly not require hiring an extra human resources staff person.

The one exception the final rule makes concerns owner-operators. Under the FMCSA rule, owner-operators are, in effect, required to get at least random testing services through a C/TPA. In an owner-operator, the driver is his or her own boss, so there is no one else in his or her own organization to direct him or her to stop performing safety-sensitive functions. In this situation, we think it is probably better to permit the C/TPA to perform what otherwise would be a DER function.

Collection Process Issues

Commenters were interested in a variety of issues in the drug testing collection process. These included dilution issues, the consequences of refusing to drink fluids and the length of the interval before the second collection attempt in ''shy bladder'' situations, retests under direct observation when a split specimen is unavailable for testing, using split specimen collections in all DOT modes, and having employees remove boots as part of the preparation for a collection.

Comments

The first issue in this category is whether, when there is a specimen that is both negative and dilute, there should be an immediate recollection under direct observation. Commenters took a number of positions on the issue. Some employers and service agents favored making retests under direct observation mandatory, on the ground that a dilute specimen effectively formed a basis for a reasonable suspicion that the employee had tried to conceal drug use. Some unions and service agents opposed such a requirement because it would intrude on employees' privacy, might well result from innocent consumption of water, and was of dubious value in deterring and detecting illegal drug use.

A plurality of commenters favored making a recollection, as well as the decision about whether to use direct observation, optional with the employer. This approach, they said, would recognize the variety of situations in which a dilute specimen may occur. It could be done in consultation with MROs, to ensure that there was some medical input into the employer's decision.

The second, related issue is whether an employer should be able to disregard a negative dilute result. For example, suppose an employer receives such a result on an applicant's pre-employment test. Should the employer be able to require the applicant to take another test to get a ''real negative'' before beginning safety-sensitive work? Most employers, and some service agents, who commented on this issue favored this approach, especially in pre-employment testing. They did so in the belief that a negative dilute result was, at best, questionable. Even if it did not result from a deliberate attempt to cheat on a test, it was not as definite a

demonstration of compliance as a negative test from a more concentrated specimen. Unions and some service agents disagreed, saying that this would unnecessarily burden employees, including many who could achieve dilute (as distinct from substituted) results naturally, by drinking a lot of water (which some commenters made a point of noting was a legal substance). This approach would involve a ''guilty until proved innocent'' approach, in this view.

Most, though not all, employers said that an employee who refuses to drink additional liquids after failing in his or her initial attempt to produce a sufficient specimen should be regarded as having refused to test. These commenters saw refusals to drink as attempts by employees who had used drugs to avoid a positive test. They also viewed it as a waste of up to three hours of time that the employee remained off the job (but presumably in paid status). Some service agents also shared this point of view. Unions and other service agents disagreed. They said that an employee could have legitimate health or other reasons for not wanting to drink additional fluids. Moreover, if an employee fails to drink fluids, and consequently fails to produce a sufficient specimen on the second try, the employee will be referred to a physician for an evaluation. If the physician does not find that a medical condition produced, or could have produced, the inability to provide a sufficient specimen, the employee will be treated as having refused the test. This consequence is sufficient, these commenters said.

When an employee has a verified positive test, the Omnibus Employee Testing Act gives the employee the right to request a test of the split specimen. The Department has long taken the position that if the employee makes a timely request to test the split specimen, and the split specimen is unavailable for testing (e.g., the split specimen was never collected, leaked away, or was lost), the test must be cancelled. While we believe this outcome is necessary as a matter of law, it raises a safety concern. In such cases, we have an apparently valid, verified positive result, indicating that the employee used illegal drugs. However, because of the accidental unavailability of the split specimen, the employee can continue to perform safety-sensitive functions.

In response to this concern, the NPRM sought comment on the idea of requiring a recollection under direct observation in these cases. This might detect drug use by the employee and result in his or her removal from the performance of safety-sensitive functions. The rationale for the direct observation aspect of the procedure reflects the belief that an employee, having recently tested positive, may have an additional incentive to cheat on the second test.

Comment was divided on this issue. Employers generally supported the proposal to require recollection under direct observation on the safety rationale mentioned above. Unions and some service agents opposed the proposal, saying that it undermined the employee's right to a test of the split specimen. Some added that the second test would not really answer the question of whether the employee has tested positive on the first test. Opponents of the proposal particularly objected to the direct observation aspect of it, on intrusiveness and violation of privacy grounds. Why, they asked, should someone suffer a directly observed test because the collector made an error?

Currently, those DOT agencies covered by the Omnibus Transportation Employee Testing Act—FRA, FAA, FTA, and FMCSA—are required to collect split specimens. RSPA and Coast Guard, whom the Act does not cover, give employers the choice of collecting single or split specimens. Commenters on this point almost unanimously favored requiring split specimens in all DOT agency programs. They said that this would be much simpler and less confusing, and likely would reduce the incidence of errors (e.g., failure to collect split specimens where required). Split specimen collections are not any more expensive than single specimens, one commenter said. One commenter questioned the Department's authority to require split specimen testing in RSPA and the Coast Guard absent legislation.

The Department has heard concerns, over the years, that some employees have concealed adulterants or other means of tampering with tests in their boots (e.g., cowboy boots). For this reason, the NPRM proposed that collectors would ask employees to remove their boots, so that collectors could check them for such items. Commenters almost unanimously panned this proposal, asserting that it was intrusive, ineffective, and inconsistent (i.e., vis a vis the rule's treatment of other footwear and clothing). Commenters raised specters ranging from confrontations between employees and collectors to exposing collectors to unpleasant foot odors.

DOT Response

With respect to the issue of negative dilute tests, the Department has decided to give employers discretion about how to handle these situations (see —40.197). There are reasonable arguments on both sides of this question, and the Department is not persuaded that that there is a single, across-the-board, right answer. The variety of circumstances among employers appears too wide to permit a unitary solution. In response to concerns about recollections being unduly burdensome on employees, the Department will require that a given employer treat all employees equally, to avoid the possibility of arbitrary selections of individuals for recollection. That is, an employer would have to treat all situations in a given category the same way (e.g., require recollections in all pre-employment test situations that had negative dilute results). This would prevent employers from singling out disfavored employees. In addition, employers would be limited to a total of two tests (the original negative dilute result and one recollection). They could not conduct additional tests if the recollection were also a negative dilute, for example. This provision limits the potential burden on employees.

If an employer chooses to conduct another test, it could not be conducted under direct observation, unless one of the other circumstances permitting or requiring direct observation occurred. We use direct observation primarily to counter the likelihood of tampering at the collection site. This makes sense in situations where we are mostly concerned about adulteration or substitution. Most dilution cases, however, arise because an individual hydrates his or her system before going to the collection site. Privacy issues aside, then, direct observation seems off point in the dilution situation. What is useful is giving an employee the shortest possible interval between notice of the test and the conduct of the test, so that the individual does not have time to overhydrate. For this reason, the rule requires employers to provide no advance notice of the recollection to employees.

The Department will not include any general provision requiring or authorizing employers to disregard the results of negative dilute tests. Given the structure of the rule, such a provision is unnecessary. Employers have the discretion to conduct one recollection following a negative dilute result. If the employer chooses not to conduct a recollection, then the negative result is the only result it has, and the employer will rely on the result just as is does in any other case. If the employer does conduct a recollection, then the result of

the recollection—not the original test—becomes the result on which the employer relies for all purposes. The original test would be cancelled in this situation, and not reported for management information system (MIS) purposes.

The bottom line in any ''shy bladder'' situation is that, if, by the end of the collection process, the employee has not produced a sufficient specimen, the employee must be evaluated by a physician. Unless the physician finds that a medical condition resulted, or could have resulted, in the inability to provide a sufficient specimen, the employee is regarded as having refused to test (see —40.193). Given this provision, we believe it is unnecessary to say that a refusal to drink fluids, standing alone, is a refusal to test.

As some commenters said, there may be legitimate reasons for an employee's decision not to drink fluids in this situation. In any case, if the employee declines to drink, subsequently does not produce a sufficient specimen, and cannot establish a medical condition explaining his or her inability to provide the specimen, a refusal to test will be established. While having employees waiting in a collection site for three hours, with or without drinking, may annoy employers and collectors, we do not believe this is a sufficient reason to terminate the shy bladder process because the employee does not choose to drink during that period.

We believe that there is a strong safety rationale for requiring a recollection under direct observation following a verified positive, adulterated, or substituted test that is cancelled because the split specimen is unavailable for testing. In this situation, we know that there were drugs or an adulterant in, or substitution of, the primary specimen, and that there was no legitimate medical explanation. Split specimens fail to reconfirm the result of the test of the primary specimen in only a tiny minority of cases. If we do not collect another specimen in this case, there is a very high probability that we will be permitting an employee who has used illegal drugs, or tried to tamper with a test, to continue performing safety-sensitive functions. That is a significant safety concern.

By recollecting another specimen, we have some possibility of detecting continuing drug use. Knowing that recollections will occur in this situation may also have some deterrent effect on employees. By recollecting another specimen under direct observation, we can limit the opportunities for tampering, for which there is a heightened incentive in this situation. We do not view this provision as penalizing an employee because a laboratory or collector erred. Rather, in the face of a laboratory or collector error, we view this provision as closing an inappropriate loophole for an employee who appears to have used illegal drugs or tried to defeat a test.

We agree with commenters that it makes much more sense for all DOT agencies to have consistent requirements concerning split specimens. Therefore, Part 40 requires all collections to be split specimen collections, and RSPA and Coast Guard will amend their rules accordingly. We will delete from Part 40 all references to single specimen collections. There is no legal authority issue here: RSPA and Coast Guard base their rules on their statutory general safety authority, which does not contain specific requirements or prohibitions concerning how drug specimens are collected. There is no legal difference between these agencies using their discretion in implementing their general safety authorities by requiring split specimen testing and using it to give employers an option between split specimen or single specimen collections.

We are persuaded by commenters that we should not go forward with the proposal to have collectors remove and inspect boots. The problems of this approach likely outweigh the benefits. Therefore, we have booted this provision out of the final rule.

Information Release Issues

MROs sometimes find themselves in a dilemma. They verify a positive test result on an employee of Employer A. They also know that the same employee works in a DOT-regulated safety-sensitive position for Employer B. Consistent with safety and confidentiality responsibilities, what should the MRO do? The NPRM sought comment on this issue. The NPRM also asked for comment on whether MROs and other parties (e.g., C/TPAs) should report positive tests and other rule violations to DOT operating agencies, so that they could take enforcement action.

Comments

There was a variety of comment on the idea of MROs sharing test information with other employers. Many employers, MROs, unions and other parties opposed allowing MROs to do so because it would breach employee confidentiality. Given the large data bases that some service agents maintain, this breach could be very wide, some commenters said. Some service agents questioned whether the proposed rule's language would have the effect of creating a duty on service agents to conduct searches of such data bases.

Other MROs and employers favored giving MROs this discretion, in order to enhance safety and help MROs who find themselves in this dilemma. Commenters cited potential liability concerns on both sides of the question. Other commenters suggested that more systematic approaches to this problem might be more productive, such as creating a national data base of persons who had violated rules or requiring employers hiring new workers to check with previous employers about past test results (as FMCSA's rule already does). Canadian commenters also mentioned a concern that information release to third parties without individual employee consent may violate Canadian law.

Commenters addressed the issue of release of information in legal proceedings. The existing rule and the NPRM focus on legal proceedings brought by an employee (e.g., an unjust termination suit). What about personal injury cases in which the employee's test result is a relevant issue, commenters asked.

Some commenters thought that having service agents report rule violations to the DOT agencies was a good idea that would enhance safety. For example, if an owner-operator fails to show up for a test and continues to drive, only the C/TPA may know of the refusal. If the C/TPA does not report the problem to FMCSA, the likelihood of the owner-operator getting away with his or her refusal is heightened. Others raised confidentiality concerns and thought that there could be problems if service agents reported incomplete or erroneous information to the DOT agencies. Some service agents also feared that if they had authority to report violations to DOT agencies, even if this were not mandatory under the rule, they would be liable for not doing so. Others thought that this would create a difficult conflict of interest situation for service agents.

DOT Response

The Department has decided to drop the proposal to permit or require MROs to pass on to third party employers information about the results of tests the employee took at the direction of another employer. The Department understands that confidentiality rules sometimes place MROs in a difficult position. Nevertheless, confidentiality is a cornerstone of the balance between safety and employee privacy that is crucial to the acceptance and constitutionality of the testing program. The Department is also concerned that

it would be very difficult to draft a provision that solved the ''doctor's dilemma'' situation without opening the floodgates to widespread searching of large data bases for information on employee testing records that could severely compromise confidentiality. We do not think our NPRM language succeeded at this task. Consequently, as under the current rule, MROs will be prohibited from passing such information on to third party employers without the employee's consent. As described in the discussion of § 40.25, we are adding a requirement to query previous employers for drug and alcohol test information in place of the proposed provision, based on an existing FMCSA provision.

Another alternative to the proposal would be to create a Federal data base that would include all test results, which authorized employers could search to learn authorized information about current or prospective employees. This is a significant issue, but not one we are able to resolve at this time. We do believe that, in order to be effective, a data base of this sort would have to be national in scope under Federal supervision, rather than a mixture of state, local, and private data bases. It would also have to successfully solve security, access, due process, and updating issues. Creation of such a data base remains a matter for further study.

The Department has decided to broaden the scope of release of information in the context of legal proceedings. We have added a provision (see § 40.323) that would permit employers to release test information in a criminal or civil court proceeding resulting from an employee's performance of safety-sensitive duties, if the court orders it. For example, in personal injury litigation following a truck or bus collision, the court could determine that a post-accident drug test result of an employee is relevant to determining whether the driver or the driver's employer was negligent. The employer would be authorized to respond to the court's order to produce the records.

There would be limits on the use of this information, however. The employer could release the information only to the decisionmaker, such as the judge in a lawsuit. It could be released only subject to a binding stipulation or protective order that the decisionmaker to whom it is released will make it available only to the parties to the proceeding, who could not disseminate it further or use it for other purposes. The Department believes that this approach provides for relevant use of test information without permitting the information to be spread about too widely. These limits also apply in situations where the information is made available in a proceeding brought by the employee (*e.g.*, a grievance, arbitration, or lawsuit concerning personnel action following a violation).

The Department has decided against requiring service agents to report apparent violations of the rules to the DOT agencies. Service agents can do so in any situation in which DOT agency rules already permit them to do so. The principal reason for this decision is that the Department's enforcement resources are limited. The DOT agencies must take great care in prioritizing the use of those resources, so that the greatest safety benefit is derived from their allocation.

Service Agent Contract Language

The NPRM proposed that every contract or agreement between an employer and a service agent would have to include an assurance of compliance with DOT rules. The purpose of this proposal was to ensure that the obligation to comply with Part 40 and other DOT rules was not only a matter of regulation, but also a key part of the contractual relationship among participants in the testing program.

Comments

Some employers and unions favored the proposed requirement, saying that it would help them ensure that services were provided properly. They said it would create universally understood contract remedies if service agents failed to provide appropriate services. Most of the commenters on this proposal were service agents, and they almost unanimously opposed the proposal. They said it would add substantially to the paperwork burden of the rule and would add costs (*e.g.*, for attorney involvement in the contracting process). Moreover, opponents said, there are many times in which employers do not have written contracts with some service agents (*e.g.*, collection sites remote from the employer's principal place of business), so there is no contract in which to incorporate such a clause. Requiring written contracts where none now exist would also be unnecessarily burdensome, they said. A mandatory contract clause could also lead to litigation, some commenters feared.

DOT Response

The purpose of the proposed requirement was to ensure that compliance by service agents with this and other DOT rules was an enforceable contractual responsibility. The Department now believes that this purpose can be achieved by other means. We have replaced the proposed written contract clause requirement with a regulatory statement (see § 40.11(c)). It provides that all agreements and arrangements, written or unwritten, between employers and service agents are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug and alcohol testing regulations. The rule declares that compliance with these provisions is a material term of all such agreements and arrangements. Combined with the PIE provisions of Subpart R, this provision ensures that when a service agent is in noncompliance, DOT (through a PIE) or an employer (through a contract action) can respond effectively to service agent noncompliance. These provisions will achieve the Department's objective without incurring the paperwork burden and other problems cited by commenters with the NPRM provision. We also did not want to create potential compliance problems for service agents and employers based on the lack of a written agreement.

Electronic Technology Applications

The NPRM asked for comment on how best to incorporate electronic technology into the drug and alcohol testing process to a greater extent.

Comments

A substantial majority of all commenters on this issue strongly supported the wider use of electronic technology throughout the DOT drug and alcohol testing program. The suggested applications included such things as electronic signatures by various participants, an electronic CCF, and electronic storage and transmission of data. One of the goals mentioned in some comments was the ''paperless lab.'' Supporters emphasized the greater speed and efficiency of these applications, contrasted to a paper-based system. Some commenters noted that electronic applications of this kind were already in wide use in the private, non-regulated sector of drug and alcohol testing, and that the Food and Drug Administration had approved the use of electronic signatures in some contexts.

Commenters mentioned that, in order to do the job right, electronic applications had to ensure the integrity and security of information, but many commenters also said that appropriate technological tools for this purpose already existed. Some commenters sounded cautionary notes, particularly with respect to the Department being assured of the effectiveness of system safeguards and the forensic acceptability

of electronic records and signatures before authorizing additional use of electronic applications in the program.

DOT Response

The Department believes that the increased use of electronic methods in the program is both inevitable and beneficial. At the same time, we want to make sure that there are good, consistent minimum standards for the use of this technology, so that the integrity and confidentiality requirements of the program continue to be met. For this reason, the Department, in cooperation with HHS and the Office and Management and Budget (OMB), intend to form an advisory committee under the Federal Advisory Committee Act. Many of the interested parties began meeting this past summer to discuss the issues under the auspices of an OMB information technology initiative.

This committee would be charged with making recommendations to DOT and HHS concerning changes in our regulations we could make to accommodate electronic technology. The committee would also make recommendations about consistent minimum standards for the technology used in Federal drug and alcohol testing programs. The Department anticipates that, following the receipt of the committee's recommendations, DOT and HHS will propose changes to Part 40 and the HHS Guidelines that will result in authorizing the more widespread use of electronic technology in the program.

Meanwhile, the Department will make some modest changes to its requirements. For example, we will permit greater use of faxes and scanned computer images for reporting test results. Additionally, we are permitting laboratories to send electronic results reports to the MROs, provided that the laboratory and the MRO ensure that the information is accurate and can be transmitted in such a manner as to prevent unauthorized access or release of this information while it is transmitted or stored. The Department, at this point, is not requiring specific transmission or security standards, but as these are developed in the future, we will provide them as guidance for laboratories and MROs. Even when the Department has changed its regulations to permit greater use of electronic methods, we expect to retain the option to use a paper-based system, however. This is because many of the participants in our program, such as small transportation employers, may not be equipped to participate in a fully electronic system.

MRO/Laboratory Conflicts of Interest

The Department has long believed that the MRO has a uniquely important responsibility for maintaining the integrity of the Department's drug testing system. For that reason, since the beginning of the Department's program, we have been concerned about the potential of conflicts of interest between MROs and other participants in the system, particularly the laboratory. For example, if an MRO is reviewing results of a laboratory with which the MRO has a financial relationship, it could happen, or appear to happen, that the MRO would be less likely to bring problems in the laboratory's test results to light. In the NPRM, the Department asked commenters for their thoughts on conflicts of interest, particularly whether the Department should state with greater specificity the kinds of relationship that involve conflicts or the appearance of conflicts.

Comments

Some commenters questioned the NPRM's focus on the MRO-laboratory relationship, saying there were other relationships among participants that could be as or more troubling (*e.g.*, laboratory-collection site relationships). Commenters also differed about what the rule should say about laboratory-MRO relationships. Some commenters favored a strict separation of roles, while others said that the program would be more efficient and less costly if MROs and laboratories could collaborate more closely. Some commenters, in response to a preamble question, supported adding more specific guidance to the rule on what sorts of relationships were considered inappropriate.

A large majority of comments on this issue said it was important for the rule text to list the kinds of relationships that the Department regarded as creating conflicts of interest between MROs and laboratories. The comments acknowledged the significance of maintaining laboratory/MRO relationships that were free of such conflicts, in order to maintain the integrity of the program. In the absence of specificity, however, a general provision prohibiting conflicts or requiring a certification that there were none would be ineffective, they said. Commenters generally agreed with the list of conflicts listed in the NPRM preamble, as a means of ensuring the necessary separation of functions among participants. Commenters who dissented from this position usually argued that to prohibit close MRO/laboratory relationships would interfere with the integrated organizational arrangements that were most efficient in providing services to customers economically (*e.g.*, one-stop shopping or ''turnkey'' programs).

DOT Response

We agree that other relationships in the program might create conflict of interest issues. However, we continue to believe that the focus on the MRO-laboratory relationship is appropriate. In our view, the MRO is a key participant in the process, whose role is to be the most important protector of the accuracy and integrity of the process. A potential conflict of interest between an MRO and a laboratory, whose results the MRO must review, oversee, and, if necessary, question, is a particularly sensitive matter for the integrity of the program. We urge appropriate caution, use of firewalls, etc. to avoid potential conflicts of interest among all participants, but we believe that clear regulatory guidance is important in the MRO/laboratory relationship.

While we recognize that commenters' views differ, we believe the program is best served by avoiding MRO/laboratory conflicts of interest or their appearance. We believe that a clear separation of their respective roles is necessary for this purpose. We have maintained this separation under the current rule, and we do not have evidence that this has unduly hampered the efficiency of the program.

In response to comments, we have added list of actions that we view as creating the reality or appearance of a conflict of interest. These examples are not new creations: they codify guidance that the Department has given in several specific situations over the years. They are essentially the same examples listed in the preamble to the NPRM, with the clarification that they apply to MROs who actually review test results produced by the laboratory in question. This list of examples is not exclusive or exhaustive: other situations may arise that would constitute conflicts. The list is the following:

(1) The laboratory employs an MRO who reviews test results produced by the laboratory.

(2) The laboratory has a contract or retainer with the MRO for the review of test results produced by the laboratory.

(3) The laboratory designates which MRO the employer is to use, recommends certain MROs, or gives the employer a slate of MROs from which to choose. We do not interpret this provision to prohibit laboratories from referring employers to a large, global list of MROs (*e.g.*, a list of all MROs who have been certified by one of the

national MRO training organizations), so long as the laboratory does not edit the list or express a preference or recommendation among the MROs on the list.

(4) The laboratory gives the employer a discount or other incentive to use a particular MRO.

(5) The laboratory has its place of business co-located with that of an MRO or MRO staff who review test results produced by the laboratory;

(6) The laboratory derives a financial or other benefit from having an employer use a particular MRO; or

(7) The laboratory permits an MRO, or an MRO's organization, to have a significant financial interest in the laboratory.

Validity Testing

By validity testing, we mean testing that laboratories conduct to deter and detect tampering with tests. The two most important categories of tampering are adulterating a specimen (*e.g.*, putting a substance into a specimen designed to mask or destroy the drug or drug metabolite that the specimen may contain) or substituting a specimen (*e.g.*, supplying water or some other substance in place of urine). The NPRM proposed to require laboratories to conduct validity testing on all specimens. It asked for comment on whether MRO review and split specimen testing should be applied to specimens that laboratories found to be adulterated or substituted, as they are to specimens that test positive for drugs. Validity testing is probably the most difficult and controversial issue in this rulemaking.

Comments

1. Adulteration

A significant majority of commenters on the subject supported the idea of testing for adulterants. Commenters said that the purpose of such testing was to counteract tampering, which some said appeared to be on the rise in their experience. They cited the increased availability of substances and techniques claiming to protect drug users from testing positive for drugs, which are quite commonly advertised in publications and on the internet.

Many commenters cited the volatility of the adulterant market, noting that the popularity of particular adulterants rise and fall. As countermeasures to one substance are found, other adulterants come into prominence, in a continuing ''arms race'' between those who try to facilitate and those who try to deter and detect ways of ''beating the test.'' Therefore, commenters said, there needs to be flexibility in the ''adulteration panels'' that laboratories use, to allow them to keep up with an ever-changing adulterant market. It is not helpful, in view of this need for flexibility, to mandate testing for specific substances such as nitrites, several commenters said.

Two employee groups said that there was no evidence supporting the need for adulterant testing. They also said that adulterant testing was too burdensome. One laboratory suggested that adulterant testing should remain discretionary with laboratories, rather than mandated by the rule. Another commenter said that there should be standardized DHHS testing methodologies for adulterants, just as there are for drugs. Several commenters supported extending the blind testing program to adulterated and substituted specimens as a further safeguard. A few commenters addressed the issue of cost, but they did not agree with one another about whether adulterant testing would add significant costs to the program. Supporters of alternative testing methods (*e.g.*, saliva, hair, on-site testing) argued that their methods would be quicker and more effective at detecting adulterants than the present laboratory-based urine testing system.

2. Substitution

Generally, commenters who supported testing for adulteration also supported testing for substitution. However, a number of commenters had greater concerns about substitution testing. Some comments, including one extensive comment submitted by a union, contended that the criteria for substitution developed by HHS, and incorporated in the NPRM, were faulty and based on inadequate studies. In particular, this comment criticized the HHS criteria because the literature on which the specific gravity and creatinine levels had been based included very few ''paired studies'' looking at both criteria at once. Other comments criticized the studies because they had not specifically covered certain employee subgroups. A few comments suggested changing the name of this sort of specimen from ''substituted,'' which they found too conclusory, to ''hyper-dilute'' or something similar, which they believed to be more neutral and descriptive.

During the listening sessions and in written comments, a number of individuals said they, or people they know, had been unfairly terminated on the basis of substitution. These individuals were not drug users, they said, but had consumed large quantities of water over a long work period. In addition, they were often small-framed minority women, vegetarians in some cases. They suggested that a combination of these circumstances could have resulted in the natural, innocent production of urine meeting the substitution criteria. They sought additional procedural protections and revision of the substitution criteria to prevent people from being unfairly found to have substituted a specimen.

3. Split Specimen Testing

The Department presented three basic options for comment concerning the application of split specimen testing to findings of adulteration and substitution. The first option would have continued the Department's current policy of prohibiting split specimen testing in these cases. The second option would require split specimen testing in adulteration and substitution cases, on the same model as the current requirement for drug positives. The third option would add to the present system a requirement for the laboratory to test an additional aliquot of the specimen to ensure that the result could be replicated.

All unions who commented favored the second option. They believed this was necessary if the system was to be fair and provide due process to employees whose specimens were found to be adulterated or substituted. They asserted that the scientific basis and technical standards for adulteration and substitution findings were weaker than in the case of drug positives, but pointed out that the consequences were equivalent (or more severe, in some cases). Employees should have the same chance to double-check the former as the latter. Some employers and service agents also supported this approach, principally on fairness grounds.

Supporters of the first and third options, including a number of employers and service agents, opposed split specimen testing in adulteration and substitution as providing a second opportunity for an employee to beat the test. In addition, they said that the properties of many adulterants were unknown, and an adulterant might degrade in so short a time so that it would fail to reconfirm on a split specimen test. Variations in the findings about the urine could result from something as simple as the freezing and thawing of the split specimen, one commenter said. Among commenters in this group, a number supported Option 3 in preference to Option 1 because it would provide some additional protection for employees without having the disadvantages of opening the split specimen.

4. MRO Review

Generally speaking, commenters lined up in the same way concerning whether MROs should review and verify adulterated and substituted test results as they did concerning split specimen testing for these results. Unions and other supporters said that MRO review, parallel to that for drug positives, should be made available as a matter of fairness. For example, if a small female flight attendant who has consumed a lot of water on a long flight gets a substituted test result, she should have the opportunity to offer an explanation to the MRO. If she made her case, the MRO should verify the result negative, just as in the case of a drug positive with a legitimate medical explanation.

Opponents of MRO review for adulteration and substitution cases said that it would be cumbersome. Also, there are not established standards for a ''legitimate medical explanation'' in the adulteration and substitution area as there are with respect to drugs, meaning that MROs would be acting in a less well informed way. Some commenters said that there were no legitimate medical explanations for the presence of adulterants, so the medical review process would be an empty exercise.

DOT Response

We begin with the premise that tampering with drug tests is a bad thing and a serious safety concern. When people do so, it is probably because they want to continue using drugs while also continuing to perform safety-sensitive duties. Continuing to do both these things is precisely what the DOT drug testing program, in the interest of safety, is designed to prevent. To the extent that people believe that they can successfully beat a test, the deterrent effect of the program is diminished. One can oppose the concept of testing to catch tampering only if one believes that it is acceptable for people both to continue using drugs and to continue performing safety-sensitive duties.

There were no commenters who said that they opposed the concept of testing to catch tampering with drug tests. Some commenters, however, said that it was not proven that tampering was so serious a problem as to warrant validity testing. The majority of commenters disagreed, and many were parties (laboratories, MROs, C/TPAs) who have significant experience in reviewing specimens and test results. Our own experience in working with participants in the program is consistent with that of commenters who believe that adulteration and substitution are relatively prevalent, serious issues requiring a regulatory response. The wide public advertising of substances and techniques to protect drug users from tests is further suggestive of a thriving cottage industry designed to help people beat drug tests.

The Department consequently will make validity testing mandatory. Laboratories will test all incoming primary specimens for dilution, substitution, and adulteration. We believe that mandating that all laboratories test all primary specimens will result in greater uniformity of testing methods. Testing methods must be consistent with HHS requirements and guidance (HHS Program Documents 35 and 37 at the present time), upon which DOT will rely for purposes of this rule. As noted above, we will coordinate the effective date for mandatory validity testing with the issuance of HHS mandatory requirements on validity testing. The Department is convinced that testing in accordance with HHS requirements and guidance results in scientifically valid tests for pH, creatinine, specific gravity, and various adulterants.

Consistent with comments that it was not advisable to list specific adulterants in the rule, since they change rapidly, the Department will simply rely on HHS rules and guidance, which can change to reflect new adulterants for laboratories to test. The Department's final rule also minimizes statements of requirements for laboratory testing methodology, since that is also an area in which we rely on HHS requirements and guidance. We do not believe that extensive duplication is necessary.

The Department has thought a great deal about the HHS substitution criteria, which were the subject of extensive comment. HHS developed these criteria based on an extensive review of the literature (''NLCP: STATE OF THE SCIENCE—UPDATE # 1—Urine Specimen Validity Testing: Evaluation of the Scientific Data Used to Define a Urine Specimen as Substituted (February 14, 2000)''). We are aware that this literature review included only a few ''paired studies'' that simultaneously looked at both the specific gravity and creatinine criteria. Nevertheless, there is nothing in the HHS literature review that suggests any other criteria that would be more appropriate for determining substitution or that the existing criteria are erroneous. Notwithstanding the critique in the comment we received, no scientific paper of which we are aware has suggested criteria that it claimed was more appropriate. It is very significant that even the most vocal opponents of the substitution criteria were unable to provide a single documented instance of an individual meeting both substitution criteria through natural means in a controlled setting.

We are also aware that most of the studies in the HHS literature review were studies of the general population that did not focus on specific subgroups. This is an acceptable practice in medical and scientific studies. Moreover, the Department does not believe that, to adopt generally applicable substitution criteria, it must demonstrate the suitability of the criteria over and over again for every conceivable subset of the population.

To provide further information about these issues, the Department conducted its own study. The text of this study is available on the ODAPC web site (www.dot.gov/ost/dapc). The study was designed specifically to focus on two issues on which commenters criticized the HHS literature review, the absence of paired studies and insufficient study of female subjects. The DOT study made paired measurements of urine creatinine and specific gravity in a predominately female (40 of 56) group of subjects.

All participants in the study were of reasonable working age (19–56). All participants volunteered to consume at least 80 ounces of fluid spread evenly over six consecutive hours. The protocol asked for 40 ounces to be consumed within the first three hours of this six-hour test period. This would be immediately followed by the consumption of at least another 40 ounces in the last three hours of the six-hour test period. Urine specimens were collected prior to the start of the six-hour period and at the end of each subsequent hour in the test period. Urine specimens were also collected on awakening the morning of the test day and on awakening the morning following the test day (this amounted to a total of nine urine specimens being requested from each participant).

Each participant was asked to document the amount and type (water, coffee) of fluid consumed from awakening through completion of the six-hour period, along with the total amount of urine produced from awakening through the six-hour period. Height, weight, age, gender, ethnicity, eating habits, and medications taken regularly and on the day of the collections were also documented. All urine specimens were sent to an HHS-certified laboratory where creatinine and specific gravity were measured using well-established laboratory techniques.

The 56 subjects provided a total of 500 urine specimens. 504 specimens

were expected; however, three individuals did not collect one of the specimens on awakening, and one person was unable to complete the second three hours of drinking per the test protocol. Two participants were unable to consume the minimum amount of fluid originally intended (total of 80 ounces, or approximately 2370 mL, spread evenly over the six hours). The remainder consumed at least the minimum requested. Twelve participants (five men and seven women) consumed over one gallon of fluid by the end of their test periods.

Not one of the 500 specimens was identified as ''substituted'' based on the HHS criteria. This point deserves emphasis. The DOT research involved paired studies of predominately female subjects who drank copious quantities of water under controlled conditions. This examination of paired values of creatinine and specific gravity from 500 specimens collected under water loading conditions strongly supports the criteria developed by HHS. There was no evidence that individuals, regardless of gender or other factors and despite consuming unusually large amounts of fluids, are capable of physiologically producing urine meeting the HHS substitution criteria. We do note that 113 of the specimens did meet the criteria for ''dilute'' specimens, as defined by HHS. Under Part 40, a dilute specimen does not constitute a refusal to test.

The propriety of the HHS substitution criteria was not the only area on which comments were received on validity testing. Several commenters questioned the tests used to determine validity as not being equivalent to the tests used in drug testing. Specifically at issue was whether or not the use of two different technologies is required for the initial and confirmatory tests.

These comments, and their references to statements by two professional toxicology organizations—the American Academy of Forensic Sciences (AAFS) and the Society of Forensic Toxicologists (SOFT)—do not successfully make a case that the HHS-approved testing methods for adulteration and substitution are faulty.

Not all types of tests are the same. In testing for the ''HHS five'' drugs, we are looking for chemically complex substances that we do not expect to find in most specimens. We use an immunoassay followed by gas chromatography/mass spectrometry (GC/MS). As applied, for example, to amphetamines, the immunossay test identifies a broader category of substances including, but not limited to, amphetamine and methamphetamine. The GC/MS test is used to increase the specificity of the testing process and accurately prove the presence of amphetamine or methamphetamine.

By contrast, creatinine is a very simple substance that we always expect to find in urine. It is readily identified by colorimetric techniques, in which a chemical is added to urine to cause a color change and a special instrument measures light absorbed by the solution. It is not necessary with creatinine to differentiate specific complex substances from other substances that may be present in the specimen. Therefore, a second analytical technique to provide greater specificity is not needed. A single analytic technique repeated on a second specimen to ensure that we have a reproducible result is much more to the point.

In the case of creatinine, the initial validity test result is analogous to that of a confirmation drug test result. It produces a quantified result suitable for use in determining whether the specimen is substituted or diluted. The second validity test performed on the specimen is sufficient to support fully the first validity test result. Because of the nature of the creatinine, it is not necessary to use two different testing technologies to establish a test result with certainty. (A similar point can be made about alcohol.) The quoted AAFS and SOFT statements, which apply principally to tests for drugs and drug metabolites, do not conflict with this analysis.

We also point out that one important purpose of the initial immunoassay test for drugs is to eliminate negatives in a cost-effective manner. It would be possible to run two consecutive GC/MS tests on a specimen and never use the separate immunoassay technique. Such an approach would lead to results that are completely accurate and reliable, but the reason we do not require this approach is that it would be much more expensive.

In the case of substitution, the specific gravity test corroborates the creatinine result. This provides a level of forensic certainty equivalent to immunoassay followed by GC/MS in the drug testing case. Although the specific gravity tests appear to be based on simple technology, they have been established as reliable through extensive use over the many years in many clinical settings.

One commenter suggested replacing specific gravity with osmolality, asserting that measurements of osmotic concentration of urine are considered more valid than specific gravity measurements. HHS and DOT believe that there is not a significant difference between osmolality and specific gravity for validity testing purposes. In fact, specific gravity is used clinically much more than osmometry. HHS-certified drug testing laboratories have 12 years of successful experience in testing for creatinine and specific gravity testing under the HHS guidelines, and we do not believe that commenters have made a compelling case for change.

We also note that there are additional testing methods available for such substances as creatinine, nitrites, glutaraldehyde, chromium, and various possible adulterants. The fact that other tests exist does not mean that they must be used to produce an accurate result. The key point is that the methods we do use must be accurate and above reproach. DOT and HHS are convinced that the methods we use do produce the required accuracy for correct results.

Contrary to one commenter's assertion, the Department's approach to validity testing does not create a ''presumption of guilt.'' A confirmed laboratory finding, whether for drugs, adulterants, or substitution, is a matter that calls for explanation. In the absence of a satisfactory explanation, we are justified in basing regulatory consequences on the finding.

The Department, in short, has a rational and sound scientific basis for using the adulteration and substitution criteria we have chosen. Nonetheless, to ensure fairness and to provide safeguards parallel to those available in cases of positive drug tests, the Department will add split specimen testing and MRO review to its procedures in these cases.

The Department is not legally compelled to include split specimen testing and MRO review in validity cases. As explained in the preamble to the NPRM (see 64 FR at 69081–82; December 9, 1999), these additional safeguards are required neither by the Constitution nor by statute. The Department's decision is a matter of policy, in the interest of providing greater fairness to employees in the drug testing program. The Department notes that situations in which an adulterant is naturally found or a substitution naturally occurs are likely to be extremely rare. At the present time, we do not know of any such situations. However, our policy to allow medical review and use of the split specimen will provide employees with an additional level of protection and an added degree of fairness.

With respect to the use of split specimens in validity testing, the Department's process will parallel the existing split specimen procedure in the case of drug positives. Within 72 hours

of being notified by the MRO that his or her test has been verified adulterated or substituted, the employee may request a test of the split specimen. A second laboratory will test the split specimen.

Laboratories will use the testing criteria set forth in HHS rules or guidance. Under current HHS criteria for adulterants, the test of the split specimen is for the presence of an adulterant, or, in the case of an adulteration finding based on pH, to ensure that the pH of the specimen meets the same regulatory criteria as for the primary specimen. In the case of substitution, the split specimen must meet the same regulatory criteria as for the primary specimen in order to be reconfirmed. As with drug positives, the consequence of a failure to reconfirm is a cancelled test.

With respect to MRO review, the Department's process will also parallel the existing procedure for drug positives. The employee will have the opportunity to present a legitimate medical explanation. The employee, as is the case for all drugs except opiates, has the burden of proof to demonstrate to the MRO that a legitimate medical explanation exists. To meet this burden in the case of an adulterated specimen, the employee will have to demonstrate that the adulterant entered his or her specimen through physiological means. This will not be easy to do. Most adulterants are substances that do not naturally occur in urine. There is no way one can physiologically produce urine that includes such substances as bleach, glutaraldehyde, or soap, for example. There cannot be a legitimate medical explanation for the presence of these substances in urine, any more than there can be a legitimate medical explanation for the presence of PCP in a specimen.

In cases where there is no reasonable apparent legitimate medical explanation, the MRO would verify the adulterated result. However, if an employee presents what the MRO believes could be a legitimate medical explanation, the MRO will tell the employee he or she may obtain additional evaluation from another physician, acceptable to the MRO, who has expertise relevant to the explanation. This would ensure that the MRO, standing alone, would not be called on to make a decision for which he or she lacked the needed expertise. The referral physician would make a recommendation about whether there was a legitimate medical explanation. The referral physician would evaluate any information presented by the employee in making his or her determination. If the referral physician found that there was a legitimate medical explanation, the MRO would review the referral physician's recommendation and, if appropriate in the MRO's judgment, cancel the test.

MROs would follow the same process in the case of a substitution result. The MRO review provision for substitution emphasizes that it is not enough for the employee to show that he or she has a medical condition or has certain personal characteristics. The employee must establish the link between these facts and the ability to physiologically produce urine meeting the substitution criteria. For example, a replication of the employee's original test result, under carefully controlled conditions (including direct observation) could establish such a link.

To meet our fairness objectives, we believe it is necessary to provide MRO review that can result in the cancellation of a test if the employee provides a legitimate medical explanation. Nevertheless, the Department emphasizes that it is the employee's burden to prove that such an explanation exists. The MRO is not responsible for disproving an employee's assertions.

The Department will retain the word ''substitution,'' rather than changing to a term like ''hyper-dilute.'' Given the structure of the final rule, it seems clear that a laboratory ''substituted'' result is simply a confirmed result that must be verified by an MRO before becoming final, just like a confirmed drug positive. HHS uses this term in the Federal employee program, and it is useful to keep terms as consistent as possible between the two related programs.

The Department works closely with HHS on validity testing issues, and the Department will use validity testing criteria set forth in HHS requirements and guidance. Validity testing is a subject that HHS, like DOT, takes very seriously, and HHS will issue additional guidance, as needed, to support the DOT validity testing program. We will work with HHS to ensure that validity testing remains as technically sound as the rest of the DOT program. The updated and clarified collection procedures in this final rule will help insure the integrity of the urine specimen. In addition, each laboratory will conduct validity testing under specific HHS guidance and quality control review, and the blind specimen quality control program will include adulterated and substituted specimens. Validity testing has now become a factor in the HHS evaluation of laboratories for certification and recertification. In addition, the application of split specimen testing and MRO review to validity tests will provide further safeguards for employees, parallel to the existing drug testing program.

Laboratory Problems

In September 2000, the Department learned of a significant series of errors by one laboratory involved in validity testing. The first error that came to our attention involved apparent misconduct by laboratory personnel. Following a test result that met HHS substitution criteria, laboratory personnel apparently backdated documents explaining a minor irregularity in laboratory controls used to check the accuracy of testing machinery. These documents were then placed in the ''litigation package'' intended for use in an FAA certification proceeding involving the employee. To make matters worse, someone allegedly tore up a purported photocopy of the original of the backdated documents, and the laboratory official who signed the litigation package (no longer employed by the laboratory) allegedly had claimed credentials he did not have. These events undermined the credibility of the laboratory in this case so much that FAA enforcement attorneys felt compelled to settle the certification action.

Second, the laboratory made significant errors in reading test results. One error was the practice of ''truncating'' creatinine measurements (*i.e.,* expressing results only in whole numbers). This practice, which was not specifically mentioned in HHS Program Document 35 but was specifically contrary to Program Document 37, causes any result in the 5 to 5.9 range to be reported as a 5. Since a result of 5 or less is one of the criteria for substitution, this practice could have the effect of causing a specimen that was outside the creatinine criterion for substitution to be interpreted as meeting this criterion. This throws into question substitution results where the creatinine measurement was a 5. (It does not affect results where the creatinine result was below 5.) In addition, laboratory personnel apparently interpreted an error message (''LLL'') from a machine used to measure specific gravity as a measurement of 1.000. There is not a sound basis for making this interpretation.

When we learned of these problems, we immediately involved HHS. The DOT and HHS Inspector Generals reviewed the apparent evidence-tampering. In addition, this situation led us to add tampering with documentation by a laboratory as a type of noncompliance that can be subject to a PIE proceeding (see § 40.365). The

employer who had used the laboratory in question terminated its contract with the laboratory and offered to rehire five employees whose test results had been thrown into question by the laboratory's errors. The laboratory director subsequently resigned.

HHS promptly conducted a special inspection of the laboratory. Following the inspection, HHS determined that the laboratory had corrected the result-reading problems with substitution and had been, since January 2000, in full compliance with DOT and HHS requirements. HHS also surveyed all other laboratories to determine if any had made similar errors in reading results and to determine whether they were in compliance. No one else had made the error message interpretation mistake concerning specific gravity. However, HHS determined that, for varying periods of time (in many cases before the specific guidance on this point was issued in Program Document 37, but in some cases after), 40 or more laboratories had engaged in ''truncating'' creatinine results. All the laboratories involved subsequently stopped this practice, and all are now reading these results properly.

In addition to these problems, HHS also discovered that in some cases, laboratories had reported tests as substituted that did not meet both HHS substitution criteria. That is, the laboratories reported tests as substituted that met the creatinine criterion, even though they did not also meet the specific gravity criterion.

HHS has examined each individual substitution and adulteration test result that a laboratory has reported since September 1998, when Program Document 35 took effect. In any case in which a substitution result was based on a creatinine reading of 5 at a laboratory that was truncating results at the time, or in which a substitution result was reported that did not meet all HHS criteria, HHS and DOT are working to remedy the problem as it may have affected individual employees. HHS is in the process of sending a letter to each MRO involved with one of the approximately 300 specimens involved informing the MRO that the test must be cancelled. The letter directs the MRO to inform the employer of the cancellation and to tell the employer to attempt to contact the employee with this information. The employer is also told to take any appropriate personnel action in light of the cancellation.

HHS is also conducting special certification inspections of each laboratory that is performing validity testing to ensure that all its validity testing procedures are fully consistent with HHS guidance. These inspections will be completed this month. The laboratories involved full compliance with HHS validity testing requirements will now be a condition of maintaining their certification to participate in the Federal and DOT drug testing programs.

We are deeply concerned about this situation, because laboratory problems of this kind can result in unfair treatment of employees and adversely affect the credibility and integrity of our program. We point out, however, that nothing in this situation suggests that there is anything wrong with the criteria and methods for validity testing. The problems in this case were human implementation errors, now corrected, involving the reading of results and the documentation and reporting of tests, not in the testing process itself or the scientific basis for it. The Department believes that it is appropriate to continue to implement validity testing as called for in this rule.

Section-by-Section Discussion

The following part of the preamble discusses each of the final rule's sections, including responses to comments on each section.

Subpart A—Administrative Provisions

Section 40.1 Who Does This Regulation Cover?

This section attracted little comment. One commenter expressed concern about potential coverage of volunteers in one FTA program, while another wanted to specify that contractors could also be covered. The final rule specifies that contractors, volunteers, and others would be covered by Part 40 to the extent that they are subject to other DOT agency drug and alcohol rules.

The Federal Railroad Administration (FRA) operates a post-accident drug and alcohol testing program that antedates Part 40 and differs in a number of ways from the rest of the Department's programs (*e.g.,* with respect to fluids tested, drugs that are tested for). We do not intend to interfere with the implementation of this long-standing program, and we have added a paragraph making this clear.

Section 40.3 What Do the Terms Used in This Regulation Mean?

Commenters expressed interest in several of the definitions of terms in the NPRM. A commenter made a technical point that some kinds of evidential breath testing devices (EBTs) do not literally sample the ambient air, as the definition of ''air blank'' provides. We added a sentence to the definition noting that for some devices, the ''air blank'' is a reading of the device's internal standard.

A commenter noted that the definition of ''alcohol use'' talks of ''drinking or swallowing'' rather than ''consumption,'' as in the past. The reason for this change is to avoid interpretations by enforcement personnel that such actions as using an inhaler that contain alcohol are ''alcohol use'' for purposes of this part. For example, the use of rubbing alcohol, applied topically rather than imbibed, is not intended to be a violation of this part.

Commenters interested in the role of service agents in the program asked for definitions of ''consortium'' and ''third party administrator.'' One commenter provided proposed definitions, which included a requirement for individuals with certain certifications to play key roles in the organization. We considered the possibility of separate definitions for ''consortium'' and ''third-party administrator,'' but we did not find any basis for defining the terms separately. There are no meaningful conceptual or operational distinctions between organizations that call themselves one thing or the other of which we are aware or which commenters explained. In the way the terms are used in the regulation, they are for all practical purposes interchangeable. Consequently, the final rule uses the term consortium/third party administrator (C/TPA) to refer to any organization, however structured, that provides or coordinates a variety of drug and alcohol testing services to employers. Organizations would not have to change their names to conform to this definition (*i.e.,* a C/TPA that currently calls itself a ''consortium'' would not have to call itself something else).

Some commenters asked that C/TPAs be regarded as ''employers'' (especially consortia that serve small transportation companies). (This comment is related to the issue of C/TPAs serving as DERs, discussed above in the ''Principal Policy Issues'' portion of the preamble.) While this rule broadens the authorized role of C/TPAs in a number of respects, we believe that the program works best when C/TPAs and employers stay within their respective roles. An employer is an organization like an airline, trucking company, transit authority, etc. that provides transportation services and employs safety-sensitive workers. C/TPAs do none of these things. They contract with employers to provide drug and alcohol testing services. We believe the distinction between ''employers'' and C/TPAs helps to avoid confusion and

counterproductive overlap in roles between the two types of organizations, and we are retaining the NPRM's statement that C/TPAs are not employers. Any statements to the contrary in DOT agency rules would be changed in the agencies' proposed conforming amendments to this rule.

One commenter expressed concern that it was troublesome to have service agents contact a DER when there was another company representative on the scene of a testing event. This comment appeared to assume that an employer can have only one DER. This is not the case. An employer can designate as many DERs as it needs to carry out its program effectively.

Several comments on the definitions of ''medical review officer'' (MRO) and ''substance abuse professional'' (SAP) asked that other professions or members of professional groups be included within the definitions. We will discuss these issues in connection with the MRO and SAP provisions of the rule. Training and qualification matters are found in substantive sections of the rule (*e.g.,* § 40.121 for MROs), and it is not necessary to duplicate them here. However, we have added to this section definitions of terms that are used to label different types of training for MROs, SAPs, collectors, and BATs/STTs (*e.g.,* qualification training, refresher training).

With respect to the term ''chain of custody,'' we note that the definition of this term is not intended to suggest that the MRO is responsible, as part of his or her chain of custody review, to examine the internal laboratory chain of custody. The MRO need only review the CCF itself.

Commenters questioned the definitions of ''dilute'' and ''substituted'' specimens. One commenter noted that it was unnecessary to suggest that a ''dilute'' specimen had been watered down by the improper action of an employee. We agree, and have expressed the definition, like that of ''substitution,'' in neutral, descriptive terms. These definitions are augmented later in the rule by quantitative criteria for dilute and substituted specimens.

One commenter suggested slightly rewording several definitions of terms for the alcohol testing part of the program. These suggestions generally did not result in any significant substantive changes in these definitions, and we have left the definitions as they were in the NPRM. A few commenters asked for a different term in place of ''service agent,'' one suggesting ''substance abuse service professional (SASP).'' The Department believes the ''service agent'' term is short, easily understood, and inclusive, so we are retaining it. Finally, for greater clarity, we have added definitions of the ''Office of Drug and Alcohol Policy and Compliance (ODAPC)'' and ''validity testing'' to this section.

Section 40.5 Who Issues Authoritative Interpretations of This Regulation?

Section 40.7 How Can You Get an Exemption From a Requirement in This Regulation?

There were few comments about these administrative provisions. One commenter asked how to obtain answers to interpretation questions, and another asked how one might object to interpretations of Part 40. We recommend calling or writing ODAPC. A commenter suggested publishing all interpretations in the **Federal Register** periodically. We believe that it is useful to make all interpretations widely available, and we will post them on the ODAPC web site (www.dot.gov/ost/dapc). We will also consider whether publication in the **Federal Register** would be a useful additional step.

This interpretation authority applies to the application factual situations of the provisions of this rule. The Department is often asked whether, for example, the rule requires the cancellation of a test in a particular circumstance. The answer to this question is, in effect, an interpretation of the text of the rule as applied to the facts of the situation. ODAPC and the General Counsel's office work closely with the operating administrations to ensure consistency of all such interpretations with both Part 40 and the other DOT agency rules.

We will retain the provision that makes only new guidance, issued after publication of this rule, valid. We have substantially rewritten Part 40. Much of the substance of interpretations of the former version of the rule is found in the text of the new rule. Other guidance pertains to a version of the rule that will no longer exist. We anticipate publishing additional guidance pertaining to the new Part 40 (*e.g.,* an MRO manual) before the effective date of the new rule.

We want to emphasize that an exemption is not the same thing as a waiver. An exemption is, in effect, a rulemaking of particular applicability that responds to an unusual situation, not contemplated in the rulemaking and not having general application to a wide variety of situations. An agency cannot properly make *de facto* generally applicable amendments to a rule through exemptions, because this would circumvent the rulemaking process requirements of the Administrative Procedure Act. A waiver, on the other hand, is a generally applicable provision in a rule that permits regulated parties to comply through an alternative means, if certain conditions are met (*e.g.,* § 40.21).

Part 40 is an Office of the Secretary (OST) rule. Consequently it is OST, and only OST, that has the authority to grant exemptions from it. Since Part 40 is applied to regulated employers through the other DOT agency drug and alcohol testing regulations, exemptions to Part 40 are implemented via the other DOT agency regulations. There may be situations in which DOT agency regulations impose requirements that go beyond those of Part 40. In such a case, a regulated party might need to obtain an exemption from the additional DOT agency provision as well as from a Part 40 provision.

Subpart B—Employer Responsibilities

Section 40.11 What Are the General Responsibilities of Employers Under This Regulation?

Most of the comments about this section concerned proposed paragraphs (d)–(f), which would have required contracts or written agreements between service agents and employers to include a clause making compliance with Part 40 a material term of the contract. These comments and the Department's response are discussed in the ''Principal Policy Issues'' portion of the preamble.

A few commenters also objected to language in the proposed paragraph (b) saying that employers must ensure that service agents comply with their regulatory responsibilities. The thrust of these comments was that employers do not have the resources or expertise to monitor the compliance of their sometimes far-flung service agents. In response, we have merged language of paragraph (b) with § 40.15(c). It no longer places an active compliance monitoring responsibility on employers, but simply says that the employer's good faith use of a service agent is not a defense to a DOT enforcement action. For example, if an employer's MRO fails to conduct verification interviews, the employer could be subject to civil penalties from a DOT agency (the MRO could independently be subject to a PIE proceeding). As an employer, you can contract out your drug and alcohol testing program functions, but you cannot contract away your compliance responsibilities.

Proposed § 40.13 Nuclear Regulatory Commission (NRC) Program

The NPRM proposed that there be reciprocity between the DOT and NRC drug and alcohol testing programs. A number of commenters favored this approach in principle, some asking that the notion of reciprocity be extended to other Federal testing programs. A few commenters opposed the proposal, saying that NRC rules did not measure up to DOT rules. Other commenters pointed to numerous differences between the two regulatory programs, with respect to program concepts, specific requirements, forms, and administration. Some suggested that a reciprocity agreement be created between the two agencies detailing how these differences would be handled. Others said that the more stringent of the two rules on each particular point should govern.

The Department has concluded that the wide variety of program differences between the DOT and NRC regulations make it impractical to establish reciprocity between the two systems. These differences involve such matters as testing methods, consequences of some alcohol test results, alcohol testing forms, reporting and recordkeeping, inspection and enforcement procedures and responsibilities, and return-to-duty procedures. We believe it would be very difficult to craft a provision that did justice to both programs and decreased, rather than increased, confusion among employers and employees. While we believe reciprocity and ''one-stop shopping'' are worthwhile objectives, we do not believe they are practically achievable in this case. In addition, the numbers of double-covered employees and employers (either with NRC or other Federal agencies) are quite small in comparison to the total number of parties covered by the DOT program. For these reasons, we are not making this proposed section part of the final rule.

Section 40.13 How Do DOT Drug and Alcohol Tests Relate to Non-DOT Tests?

This section is based on proposed § 40.15 of the NPRM. It continues to require that DOT and non-DOT tests be kept strictly separate. Comments were generally supportive of this concept, but some asked for clarification. Paragraph (b), for example, clearly concerns collections rather than other parts of the testing process, and the text has been changed to make this explicit. This provision does not, as one commenter wondered, mean that laboratories must process DOT and non-DOT specimens in separate batches. Another commenter suggested that the ''firewall'' between DOT and non-DOT tests would be stronger if we required that an employer use separate laboratories for the two types of tests. We have not become aware of any problems that use of the same laboratory has created, and we think that this idea would increase costs and administrative complexity for employers.

A few commenters mentioned a desire to permit tests for other drugs, beyond the ''HHS five.'' This is a long-standing issue in the program, and DOT continues to take the position that we ought not go beyond the testing that HHS has authorized and for which HHS has certified laboratories. We agree with comments that inadvertent use of non-Federal forms should be a correctable flaw and that employers may appropriately use the CCF for Federally-regulated tests (*i.e.,* under the HHS program for Federal agencies). The final text makes changes to these effects. The Department does not object to laboratories creating a standard form for non-DOT tests.

One of the most important provisions of this section prohibits the use of DOT specimens for tests other than the ones explicitly authorized by this part. For example, the rule forbids laboratories and other parties from making a DOT specimen available for DNA testing. This incorporates in the rule text a long-standing DOT interpretation of Part 40. We say this for two main reasons. First, under these regulations, a properly completed chain of custody conclusively establishes the identity of a specimen. No additional tests are required for this purpose.

Second, the only thing a DNA test can do is to determine, to a high level of probability, whether a specimen and a reference specimen were produced by the same individual. If the DNA test establishes a high probability that the original specimen tested for drugs and a reference specimen came from different individuals, this may mean one of four things. It could mean that there was an error in the collection, transmission, or handling of the specimen. It could mean that the employee provided a substituted specimen (*e.g.,* someone else's urine) at the original collection and provided his or her own urine for the reference specimen. It could mean that the employee provided his or her own urine at the original collection and substituted someone else's urine for the reference specimen. It could mean that the individual provided substituted specimens from two different sources at the original collection and for the reference specimen. A DNA test cannot distinguish among these possibilities. Given a proper chain of custody, the last three possibilities are significantly more probable in practice than the first. A DNA finding of difference between the two specimens is not, then, a valid basis for canceling a test.

Even if a DNA test is performed, contrary to these rules, this section prohibits employers from changing or disregarding a verified positive test. In such a case, regardless of the result of the unauthorized test, the employer cannot return the employee to the performance of safety-sensitive functions until and unless the employee successfully completes the return-to-duty process. The same point applies to other unauthorized tests (*e.g.,* if the employee goes to his or her own doctor and gets a second urine test or a blood test).

Section 40.15 May an Employer Use a Service Agent to Meet DOT Drug and Alcohol Testing Requirements?

This provision is based on § 40.17 of the NPRM. It provides that an employer may use a service agent to carry out drug and alcohol testing program tasks. There were not many comments on this section, and they generally supported the provision. Some commenters sought to limit the responsibility of employers, saying they should not be accountable if they failed to comply with the rules because a service agent erred. As noted above, we disagree: employers always remain accountable for noncompliance, whether they run their own programs or outsource them. Another comment suggested laboratories should not be subject to DOT regulations, since they are regulated by HHS. It is certainly true that DOT relies on HHS for laboratory certification matters. However, laboratories have responsibilities under Part 40 independent of their HHS responsibilities (*e.g.,* with respect to relationships with MROs, release of information, and validity testing), and laboratories must be accountable to DOT in those matters.

We agree, however, that we should not require employers to have active monitoring responsibilities with respect to service agents, though employers may choose to monitor their service agents' performance. Therefore, we have altered paragraph (b) to require employers simply to make sure that service agents meet regulatory qualifications. To this end, employers may ask to see documentation from service agents, who are obligated to provide it.

Section 40.17 Is an Employer Responsible for Obtaining Information From its Service Agents?

This is a new section, responding to problems that the Department has encountered in the enforcement process. It is closely related to the point, made in previous sections, that an employer is responsible for its own compliance with DOT rules even in the face of mistakes by service agents. The section says that an employer has an affirmative responsibility to get information from service agents that is needed for compliance purposes. For example, suppose an applicant for a safety-sensitive job takes a pre-employment drug test, but there is a significant delay in the receipt of the test result from an MRO or C/TPA. The employer must not assume that ''no news is good news'' and permit the applicant to perform safety-sensitive duties before receiving the result. Rather, the employer would have to seek out the information about the test result from the service agent before putting the employee to work.

Section 40.21 May an Employer Stand Down an Employee Before the MRO Has Completed the Verification Process?

Proposed §§ 40.19–40.21 have been relocated to Subpart Q, and we will respond to comments on them in the corresponding part of the preamble. There is no § 40.19 in the final rule. Section 40.21 concerns the issue of stand-down. This issue was raised by proposed § 40.159(a) of the NPRM. We have relocated the section here since it pertains primarily to the responsibilities of the employer. We discussed the general policy issues surrounding stand-down in the ''Principal Policy Issues'' portion of the preamble.

The comments responding to proposed § 40.159(a) focused almost exclusively on the pros and cons of stand-down as a policy. They did not address the details of how a stand-down policy would be implemented. In formulating § 40. 21 of the final rule, we have crafted provisions specifically responsive both to the safely and privacy/employee protections sides of the issue that commenters raised.

Paragraph (a) states the general policy prohibiting stand-down, except where a DOT agency grants a waiver. We note that this prohibition, and waivers of it, apply in adulteration and substitution cases as well as cases in which there is a confirmed test result for drugs or drug metabolites. Paragraph (b) tells employers to send their waiver requests to the DOT agency whose rules apply to the majority of the employer's covered employees. For many employers, whose employees are covered by only one DOT rule, the decision is obvious. An employer with covered employees in more than one DOT agency category would count the employees in each category. For example, an employer with 500 aviation personnel and 1000 truck drivers would send its request to FMCSA. In such a case, FMCSA would coordinate with FAA before making a decision on the waiver request.

Paragraph (c) lists the items that an employer must include in a waiver request. The first set of items are information that DOT agencies will use in determining whether to grant a waiver. It should be emphasized that none of the items in paragraphs (d)(1) are intended to create mandatory prerequisites to receiving a waiver. That is, we do not require that an organization be a particular size, or have an in-house MRO, or have had an accident during the period before verification was completed, in order for its waiver request to be granted.

Any organization that wants a waiver to do stand-down must have a written company policy on the subject. An employer must include its proposed policy with its waiver request, making sure that it covers seven mandatory elements. The first is distribution of the written policy to all covered employees. Each employee subject to stand-down must receive an individual copy of the policy: posting on bulletin boards or web sites is not sufficient. The second pertains to confidentiality. There must be an effective means of ensuring that only those persons with a need to know—the employee, the DER, and the MRO—are told that the employee is being stood down because of a confirmed laboratory positive, adulterated, or substituted test result. We understand, of course, that the employee's supervisor will need to know that the employee is being removed from performance of safety-sensitive functions, but the supervisor must not be told the reason for the action. It is sufficient that the supervisor be given a general explanation (*e.g.,* medical qualification reasons, personnel evaluation reasons).

The third item is equality of treatment within a given job category. An employer cannot pick and choose the employees to whom it will apply a stand-down policy. That would be unfair. The employer must choose to stand-down all DOT-regulated employees in each job category or none. For example, an airline's policy could provide that all pilots would be subject to stand-down, but mechanics would not. However, the airline could not choose to stand down some pilots, but not others. When we use the term ''job categories'' in this paragraph, we mean broad, inclusive categories of employees, rather than narrower subsets of employee categories that might be used for pay or personnel purposes.

The fourth item is a means of ensuring that stand-down is applied only with respect to the performance of safety-sensitive duties. For example, suppose a motor carrier's policy calls for stand-down with respect to drivers. The laboratory reports a confirmed positive drug test for Driver X. Driver X is scheduled to drive a commercial motor vehicle over the next few days. The company would stand Driver X down, so the driver would not be performing a safety-sensitive function during the verification period. The laboratory also reports a confirmed positive drug test for Driver Y. However, during the next few days, Driver Y is scheduled to be in training or to be on personal leave. The motor carrier would take no action with respect to Driver Y (including notification of a supervisor), because he or she would not be performing safety-sensitive duties during the verification period.

The fifth item, concerning pay status of employees, is a very important matter of policy. As discussed above, employers who stand employees down must continue to pay them until and unless there is a verified adulterated, substituted, or positive test result. This obligation is to pay the employee in exactly the same way he or she would have been paid but for the stand-down. For example, suppose an employer stands down an employee from Monday through Thursday. If the employee would have been paid for 8 hours of work on each of the four days in the absence of the stand-down, then the employee would be paid for this amount of work. If the employee would only have worked on, and been paid for, only Tuesday and Wednesday, then the employer would pay the employee for these two days' work. We note that this obligation to pay the employee ends with a verification of a positive, adulterated, or substituted test, even if the employee subsequently asks for a test of the split specimen.

For the sake of both employers and employees, it is very important that verifications proceed quickly when an employee is in a stand-down status. Therefore, the sixth condition is that the verification process must start at once and take no more than five days (a time period consistent with requirements for the verification process elsewhere in the rule). The process could exceed this five-day limit only for extenuating circumstances (*i.e.,* the MRO provides a

written statement to the employer that a longer time is needed to complete verification).

The seventh mandatory part of the employer policy is that, if an employee is stood down and the MRO verifies the test negative or cancels it, the employer must immediately return the employee to safety-sensitive duties. The employee must not suffer any adverse personnel or financial consequences. The employer must not maintain any individually identifiable records of the confirmed positive laboratory test. That is, the employer would have to expunge any individually identifiable record of the confirmed positive laboratory test and maintain only the record of the individual's verified negative or canceled test. This places both the employer and employee in the same position they would be in if the employer did not have a stand-down policy. The MRO will have a record of the laboratory test result that inspectors can access if necessary.

This provision goes into effect on August 1, 2001. DOT agencies will not consider petitions for waivers before this effective date. In considering waivers, each DOT agency will use its own procedures applicable to waivers from its regulatory requirements. The concerned DOT agency Administrator, or his or her designee, will make each decision about whether to grant a waiver considering both the safety and the employee protection aspects of the matter. Administrators will informally coordinate proposed responses to waiver requests with ODAPC and other affected DOT agencies, in order to ensure intermodal consistency in the Department's responses. DOT agencies will respond to all waiver requests in writing, stating the reasons for their decisions.

An Administrator can impose additional conditions on the grant of a waiver. The Administrator can also revoke a waiver if the employer fails to implement mandatory provisions of its stand-down policy or conditions the Administrator has placed on it. Finally, if an employer implements a stand-down policy without having a waiver, or violates the terms of the waiver (*e.g.,* tests some employees but not others in a job category, fails to implement confidentiality safeguards, fails to pay employees during stand-down periods), the employer will be subject to DOT agency enforcement action (*e.g.,* civil penalties), just as in any other case in which an employer violates DOT agency drug and alcohol regulations.

Section 40.23 What Actions Do Employers Take After Receiving Test Results?

This section is based, in part, on § 40.159(b)–(g) of the NPRM. We have added some material to it and placed it in Subpart B in order to provide employers with a convenient summary of their obligations when they receive various kinds of drug and alcohol test results. We believe that the regulatory text is self-explanatory, so we need not comment on it further here.

There were very few comments on § 40.159(b)–(g). One commenter said that the company should wait for the signed report from the MRO before taking action to remove an employee from safety-sensitive functions after a violation. We understand the usefulness of having paper in hand, but we believe that speed is more essential for safety reasons once the MRO or BAT informs the employer of a violation. Of course, the requirement to immediately remove an employee from the performance of safety-sensitive duties necessarily implies that employers may not ''stay'' this action pending any administrative or legal proceeding (*e.g.,* grievance, arbitration, lawsuit) resulting from the outcome of the testing process.

Paragraph (i) prohibits employers from changing test results (*e.g.,* determining that the laboratory result was incorrect or that the MRO's judgment on a verification issue should be overturned). Obviously, there may be some cases in which a court or administrative hearing officer will require a test result to be expunged from the record, or a test cancelled, because of a problem in the testing process (*e.g.,* a previously undiscovered fatal flaw). However, this action does not involve altering the laboratory finding or MRO determination, as such.

Section 40.25 Must an Employer Check on the Drug and Alcohol Testing Record of Employees It Is Intending To Use To Perform Safety-Sensitive Duties?

The NPRM (proposed § 40.329) would have required MROs to transmit drug test result information to additional employers in certain circumstances. If an MRO had personal knowledge that an employee whose test the MRO had verified positive worked in a safety-sensitive position for another DOT-regulated employer, the MRO would, under certain conditions, tell the second employer about the positive test, without the employee's consent. As described in the ''Principal Policy Issues'' section of the preamble, we are not adopting this proposal as part of the final rule.

In place of the proposed § 40.329, and in the absence of a Federal data base, the Department is incorporating in the final rule a provision based on an existing FMCSA provision. This provision requires employers to check on the drug and alcohol testing background of new hires and other employees beginning safety-sensitive work. Employers would have to get written consent from the applicant (in the absence of which the employer would not hire the person). The employer sends the request for information and the employee's consent to all other DOT-regulated employers for whom the employee had worked within the previous two years.

The employer cannot let the employee perform safety-sensitive duties for more than 30 days unless the employer has obtained, or made and documented a good faith effort to obtain, the required information from previous employers (as well as from firms to whom the employee applied for safety-sensitive work, where there was a positive test result or a refusal). Of course, if the employer finds that the employee has a violation on his record, and the employee has not successfully completed the return-to-duty process, the employer must immediately stop using the employee to perform safety-sensitive functions.

The Department believes that this section will help to achieve some of the purposes of the proposal to allow MROs to share test results, with fewer drawbacks. Admittedly, it affects only new employees rather than current safety-sensitive employees. However, FMCSA has had success implementing this provision, and it will help to screen out employees who are not eligible to perform safety-sensitive functions. It will also ensure that employees who violate the rules will have to go through the SAP/return-to-duty process before performing safety-sensitive duties. It will therefore have safety benefits. Because a substantial majority of all DOT-regulated employees and employers are in the motor carrier industry, this provision will result in only a modest increase in the information collection burden of the DOT program. The written consent provision of the section avoids some of the privacy concerns of the MRO information sharing proposal.

In addition to seeking information from previous employers, this section also requires employers to ask prospective employees if they have failed or refused a DOT drug or alcohol pre-employment test within the past two years from an employer who did not hire them. While we recognize that

applicants may not always tell the truth about such events, we believe that it is important to make this inquiry to help ensure that employees are not put to work in safety-sensitive positions following a pre-employment test violation without having completed return-to-duty process requirements.

Section 40.27 Where Is Other Information on Employer Responsibilities Found in This Regulation?

This is a new section, parallel to several sections (*e.g.*, concerning MROs) in the NPRM. It is a list of other sections of the rule that touch on matters of particular interest to employers. We believe it will make the rule easier for employers to use if they have a quick guide to other references in the rule to employer responsibilities.

Subpart C—Urine Collection Personnel

Section 40.31 Who May Collect Urine Specimens for DOT Drug Testing?

This introductory section to the urine collection personnel subpart states that only collectors meeting Subpart C requirements can collect specimens in DOT-regulated tests. They must meet § 40.33 training requirements. The only subject of significant comment on this section had to do with the requirement that supervisors could not collect urine specimens from employees they supervise, unless no other qualified collector was available and DOT agency drug and alcohol regulations permitted the supervisor to act in this capacity.

The intent of this provision is to prevent potential conflicts between supervisors and subordinates, as well as to avoid any claims that a supervisor was out to get an employee through manipulation of the testing process. However, commenters asked for clarification of who we meant to cover when we applied this prohibition to supervisors. Several suggested we should limit the prohibition to ''immediate supervisors,'' so that individuals higher in the organizational chain of command, who did not supervise the employee day-to-day, could act as collectors. The Department agrees, and we have added this language to the section.

Section 40.33 What Training Requirements Must a Collector Meet?

There is a strong, though not unanimous, consensus among people familiar with the DOT drug testing program that collections is the area of the program where the most errors occur that cause tests to be cancelled. For this reason, the NPRM proposed several requirements to strengthen training for collectors, though it did not go so far as to propose an equivalent of the BAT course used for alcohol testing personnel. We discussed the key points of this issue in the ''Principal Policy Issues'' section of the preamble.

We note here two additional changes we made to reduce paperwork burdens. In response to comments, we dropped the proposed requirement that called on collectors to ''attest in writing'' that they have read and understood the rules and DOT guidance. We also eliminated requirements (from proposed § 40.35) requiring organizations employing collectors to maintain records of their training. Collectors will maintain their own training documentation, which they must show on request to DOT agency representatives as well as employers or C/TPAs who use their services.

In this section and a number of others, the final rule makes reference to guidance documents being available on the ODAPC web site. These will be true statements by the time the rule becomes effective in August 2001. At the present time, however, these documents are ''under construction,'' and they have not yet made their debut in cyberspace.

Section 40.35 What Information About the DER Must Employers Provide to Collectors?

This section is not based on proposed § 40.35 of the NPRM which, as mentioned above, is not included in the final rule. It is a new section incorporating a brief statement that employers must make sure that collectors have the name of and contact information for the employer's DER, so that the collector can contact the employer concerning any problems that come up in the collection process (*e.g.,* no shows, refusals). We recognize that there may be some situations (*e.g.,* post-accident tests at locations remote from the employer's place of business) where this may not be feasible.

Section 40.37 Where Is Other Information on the Role of Collectors Found in This Regulation?

This is a section listing other sections in the rule that collectors will find useful in understanding their functions in the drug testing program.

Subpart D—Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections

Section 40.41 Where Does a Urine Collection for a DOT Drug Test Take Place?

Most comments on this section focused on two issues. The first was the conditions on use of a multistall restroom. The NPRM proposed that a multistall restroom could be used only if a closed room for urination was not available, and could be used only for monitored collections. The proposed rule text also said that a multistall restroom must provide aural privacy to the extent practicable. Several commenters said these conditions were too restrictive and would effectively preclude employers from using multistall restrooms for collections. This was a problem, they said, because in some industries, this was the most readily available type of urination facility. Some commenters also noted what they viewed as an inconsistency between the aural privacy provision of this section and the provision in § 40.69 that called on monitors to listen for sounds that might indicate tampering.

Some commenters also thought that provisions of the proposal concerning closed room urination facilities were too restrictive, particularly the statement that the room should have an external water source, if practicable. They said that many such facilities (*e.g.*, patient rest rooms in doctors' offices) had internal water sources, and the ''if practicable'' language could lead to legal challenges. They said it would be better simply to require collection sites to secure all water sources.

The Department has modified this section in response to these comments. The final rule provides that either a closed room or multistall urination facility is acceptable. In the former, while it is preferable to have an external water source, the rule makes clear that a facility that has an internal water source is also acceptable, if all sources of water and potential adulterants are secured and moist towelettes are provided. This kind of urination facility must have a full-length privacy door. This means a door that is both opaque and solid. For example, a glass door, a door with a window or other means of viewing the interior of the room from outside, or a curtain is not adequate for this purpose. Nor would it be appropriate to have a video camera or microphone monitoring the room.

If a multistall restroom is used as the urination facility, the facility must meet either of two requirements. First, a multistall restroom may be used without a monitor if all sources of water and potential adulterants are secured. Second, if these sources are not secured, the collection must be a monitored collection, meeting the requirements of § 40.69. The facility must have a partial-length privacy door (*i.e.*, for the stall in which urination takes place) to provide as much visual privacy as possible. We

have deleted the references in this section to aural privacy and in § 40.69 to ''active listening'' by the monitor.

Regardless of which type of urination facility a collection site uses, the employee is the only person permitted in the urination facility during the collection of a specimen. This requirement is intended to safeguard both the employee's privacy and the integrity of the process. The only exceptions to this rule are the observer in a directly observed collection or the monitor in a monitored collection.

Section 40.43 What Steps Must Operators of Collection Sites Take To Protect the Security and Integrity of Urine Collections?

Commenters made a number of suggestions about this section. One commenter said that the requirement to ensure that the collection site is secure before each collection was too much work. We disagree. Making this check is vital to the integrity of the program. Several commenters suggested that we clarify the requirement that a collector can have only one collection going on at a time to allow a collector to continue other collections while another employee was drinking fluids in a ''shy bladder'' situation. We think this is a good idea that would avoid potential delays at collection sites, and we have added language to this effect.

The NPRM proposed that the collector should keep the collection container within view ''to the greatest extent [he or she] can.'' A few commenters thought this requirement should be absolute, with the consequence being a fatal flaw if the collector let the container out of his or her sight. We do not believe that the requirement should be absolute. While it is important for the collector and the employee to keep the specimen in sight, a brief absence by the collector ought not be a reason for cancelling a test that otherwise meets Part 40 requirements.

As commenters suggested, we clarified that authorized personnel who may be present at the collection site may include employer representatives, that no one but direct observers and monitors could be in the urination facility with an employee, and that collectors can remove a disruptive person from the collection site.

Section 40.45 What Form Is Used To Document a DOT Urine Collection?

Earlier this year (June 23, 2000), HHS issued a new CCF for use in both the Federal employee and DOT drug testing programs. The references to the CCF in this rule are to the new form. Most provisions of this rule become effective on August 1, 2001, the same date use of the HHS form becomes mandatory for use in the Federal employee program. (Before August 1, 2001, participants in both programs have the option of using either the old or the new form.) Consequently, there will be no disconnect between the HHS form requirements and the requirements of this rule.

A few comments suggested allowing the collector to sign CCFs in advance, presumably to save time during collections. We think this idea is fraught with potential for misuse or theft of signed forms, and we will maintain the prohibition on this short cut. We have added a specific requirement for the MRO's phone and fax numbers, as a commenter suggested. A few commenters also suggested allowing the use of foreign-language versions of the form in the U.S., as well as in other countries. We have incorporated this suggestion, with the stipulation that use of a non-English version of the form that ODAPC has reviewed is allowable in any situation (here or in another country) only if both the employee and collector understand and can use the form in that language. For example, a collector who does not read French could not use a French language form, even for a French-speaking employee.

Section 40.47 May Employers Use the CCF for Non-DOT Collections or Non-Federal Forms for DOT Collections?

Some commenters supported permitting the use of the Federal CCF for non-DOT collections. Some of these comments favored adding boxes to the form that collectors could check for ''DOT'' or ''non-DOT'' collections. We have believed since the beginnings of the DOT program that it is very important to maintain ''truth in testing.'' If a form says ''DOT'' or ''Federal'' on it, despite whatever fine print qualifications or check boxes might be included, the form may easily imply to the employee that he or she is being tested under Federal law. If this is not true, as in the case of a ''company policy'' test, then we are knowingly misinforming the employee. That is unfair. Moreover, ''company policy'' tests that do not meet DOT requirements, but are conducted using the CCF, could implicate the DOT program in legal challenges to the non-DOT tests. We will maintain the existing prohibition.

Generally, most commenters on the subject agreed with the NPRM's proposal to make use of a non-Federal form in a DOT test a ''correctable flaw.'' A few comments questioned the need for the written correction. Correcting the flaw will ensure that there was an appropriate explanation for use of the non-DOT form (*e.g.,* a post-accident test where nothing else was available, a simple mistake) and will help to educate the collector involved about the need to use the correct form. We will also keep this provision in the final rule.

Section 40.49 What Materials Are Used To Collect Urine Specimens?

There were few comments on this section, which requires the use of a ''DOT Kit'' (see Appendix A for details). Laboratories and MROs should treat as a ''red flag'' any situation in which a non-conforming kit is used. While use of a non-conforming kit is not a fatal or correctable flaw in the testing process, laboratories and MROs should, if they discover that a non-conforming kit was used for a collection, check to make sure that correct collection procedures were used and that no fatal flaws occurred. Use of a nonconforming kit is a rule violation that can subject the user to consequences under DOT agency rules.

Section 40.51 What Materials Are Used To Send Urine Specimens to the Laboratory?

This provision concerns shipping containers. In response to a comment, we have omitted a reference to a standard ''box,'' leaving the provision as a performance standard requiring a container that adequately protects the specimen from damage during shipping.

Subpart E—Drug Test Collections

Section 40.61 What Are the Preliminary Steps in the Collection Process?

Commenters responded to a variety of detailed issues in this section. With respect to employees who showed up late for a test or not at all, several commenters said it was common for employees not to have appointments. As a result, employees simply appeared at the collection site, and collection site people had no notion whether they were on time or not. Commenters suggested that the proposed ''no show'' provision be limited to situations in which the collection site was at the employee's worksite or an appointment had been scheduled. We agree, and have added language to this effect.

Some commenters thought it was unreasonable to ask collection sites to do their work on a timely basis, and they therefore objected to the proposed requirement that the collection process begin without delay. We believe that, for the sake of both employers and employees, timeliness is essential for decent customer service. However, we

will respond to concerns about the flexibility of this provision by adding the modifier ''undue.'' We will also note in § 40.209 that a collector delay is not a ''fatal flaw.''

The NPRM stated that when alcohol and drug tests were being given to the same employee at the same site, the alcohol test should be given first. In response to comments concerned about backups in the testing process, we have provided additional flexibility and added an example of a situation in which an employee's urine collection might be conducted first.

The NPRM would have prohibited the collection of urine from an unconscious employee by means of catheterization. A few comments asked for clarification in other situations involving catheters. Some also suggested testing by alternative means in these cases (*e.g.,* hair, saliva). The Department is clarifying this section to prohibit collecting urine by catheterization not only from an unconscious employee, but also from a conscious employee. The former raises consent issues, and the latter, even given consent, raises safety issues. However, in the case of an employee who normally voids through self-catheterization (*e.g.,* for medical purposes), the collector must require the employee to provide a specimen in that manner.

With respect to alternative testing technologies such as hair testing, saliva testing, and on-site testing, which commenters recommended in context of several sections of the NPRM, the Department will wait upon the action of HHS before proposing to incorporate additional methods. Approval of these or other methods, and establishment of requirements and procedures for them, are matters primarily within the expertise of HHS, which is currently considering them with the assistance of the Drug Testing Advisory Board (DTAB).

Concerning identification of employees, commenters suggested that a driver's license or similar government-issued ID would be acceptable in lieu of an employer-issued credential. On the other hand, some comments pointed out that the credibility of employer-issued ID might be doubtful in the case of a self-employed individual. We have modified the section on both points. A driver's license or other government-issued photo ID will be acceptable, and an employer-issued ID from an owner-operator or other self-employed person will not.

Many of the same commenters who objected to the proposed requirement to have collectors search boots also objected, for similar reasons, to the proposed requirement (similar to that of the existing rule) to have employees empty their pockets. We believe that taking objects out of one's pockets is a minimal intrusion into the employee's privacy, which can help deter and detect some attempts to cheat on tests. In addition, this is a provision that is paralleled in HHS guidelines. The final rule retains the proposed requirement.

A few commenters objected to the provision that would bar requiring employees to sign consent forms, waivers, releases, etc. concerning the collection and testing process. These comments did not explain the reason why exacting signatures on such documents was necessary for the DOT testing process, and we do not believe that it is. We have retained it, but moved it to Subpart Q and made it applicable to all service agents, not just collection sites. One comment suggested that collection sites be able to have employees sign consent forms with respect to non-DOT tests. This rule does not limit employers' or collection sites' actions concerning non-DOT tests, but the rule does require strict separation between DOT and non-DOT testing procedures. This includes separate paperwork for a DOT and non-DOT test conducted with respect to the same employee during his or her visit to a collection site. Such a consent form must not be part of the paperwork for a DOT test, and it could not apply to the DOT test or be filled out at the same time the employee was filling out the paperwork for the DOT test.

Section 40.63 What Steps Does the Collector Take in the Collection Process Before the Employee Provides a Urine Specimen?

Commenters raised few issues concerning this section. A commenter wanted to eliminate the prohibition on the employee flushing the toilet after providing the sample, but we will retain this provision because it limits opportunities to flush away evidence of adulteration. (However, inadvertantly flushing the toilet does not create a ''fatal flaw.'') Another commenter suggested training collectors in how to detect attempts to tamper with specimens. We think this is a good idea, and our guidance will suggest it. However, we do not think it is necessary to incorporate it in rule text.

Section 40.65 What Does the Collector Check for When the Employee Presents a Specimen?

Some commenters noted that the NPRM omitted the existing provision concerning taking an employee's body temperature when the specimen temperature was out of range. This was intended. Many collectors are not medically trained, and the accuracy of some thermometers is not certain. The provision has not been too useful under the existing rule, and we will not include it in the final rule. Other comments requested revision of the temperature range (*e.g.,* to be between 94 and 100 degrees). While this idea has some appeal, we believe we need to keep Part 40 consistent with HHS provisions on this matter.

Other commenters asked for clarification whether, when one specimen has not met regulatory requirements (*e.g.,* out of temperature range, insufficient volume), the specimen should be sent to the laboratory for testing, as well as any subsequent specimen that is collected. We agree, and have included specific directions on this point. For example, when the first specimen is out of temperature range, and a second specimen is collected under direct observation, both specimens would be sent to the laboratory and tested. On the other hand, if the first specimen were out of temperature range, and the employee refused to provide a second specimen under direct observation, the first specimen would be discarded and the event simply treated as a refusal.

Section 40.67 When and How Is a Directly Observed Collection Conducted?

Directly observed specimens are controversial because of their greater impact on employee privacy. They can be useful because they reduce the opportunity for tampering. On privacy grounds, some commenters, including unions and some service agents, would prefer not to conduct directly observed collections at all. In any case, these commenters opposed adding any situations in which direct observation was required or authorized. Other commenters said that the benefit of greater protection against specimen tampering warranted direct observation in situations that suggested a heightened risk of tampering.

The Department agrees with the latter comments. In situations that may create a higher risk or greater incentive for tampering (*e.g.,* the previous collection was verified positive, adulterated, or substituted, but the test had to be cancelled because the split specimen was unavailable for testing; the previous specimen was invalid and there was no adequate medical explanation; temperature out of range; apparent tampering with the specimen at the collection site), the interests of the integrity of the testing process, with its

safety implications, outweigh the additional privacy impact of the direct observation process. On the other hand, dilute specimens may have a number of innocent causes (*e.g.,* someone likes to drink a lot of water). A dilute specimen does not necessarily imply the same higher risk of tampering upon recollection, so the final rule does not authorize direct observation in this case.

The existing rule and the NPRM both called for use of a same-gender direct observer. Some comments objected to this requirement, saying it created practical problems in collection sites that were staffed by only one collector. Other commenters insisted on retaining this requirement as a matter of privacy. We believe there is no alternative to retaining the same-gender observer requirement. Use of opposite gender observers would not only go counter to deeply held societal norms of privacy (*i.e.,* the basic reason for separate men's and women's rest rooms in public places), but might raise genuine safety concerns, particularly on the part of female participants. We would point out that the observer need not be a trained collector, so that another same-gender person could be enlisted for the task.

One commenter recommended we add a provision telling the collector or employer, as appropriate, to explain to the employee why a directly observed collection needs to be conducted. We believe that this is a good idea, and we have included a requirement in the rule to this effect.

Section 40.69 How Is a Monitored Collection Conducted?

Much of the comment on this section echoed the comments on § 40.41, supporting the use of multistall restrooms as urination facilities and urging the Department to permit the use of monitored collections at the collection sites at the employer's discretion. The discussion of multistall restrooms and monitored collections in § 40.41 is the Department's resolution of these issues. This section sets forth the procedures to be used for monitored collections.

A few commenters focused on the use of toilet bluing agents in monitored collections. They suggested that bluing not be required except in the toilet the employee is using while providing the specimen. We agree with this point with respect to a monitored collection. In a case in which a collection uses a multistall restroom as a urination facility but does not conduct monitored collections, however, all toilets must be secured, including the use of bluing.

A number of commenters again objected to the requirement that the monitor be of the same gender as the employee, essentially for the same reasons that commenters objected to the same gender requirement for direct observers. They added that, in the case of monitors, there is a less intense privacy concern because the monitors do not actually watch the employee urinate. We agree that the privacy concern is less intense in this case, and for that reason we permit the use of opposite-gender monitors who are medical professionals. Medical professionals are trained to conduct themselves properly and are less likely than other persons to raise privacy and safety concerns among employees. But legitimate privacy and safety concerns still exist to a degree in the monitored collection situation, and we believe that monitors who are not medical professionals should continue to be the same gender as the employee, as under the current rule.

Section 40.71 How Does the Collector Prepare the Specimens?

Proposed § 40.71, concerning single specimen collection procedures, has been deleted, as all collections will now be split specimen collections. This section is based on proposed § 40.73. There were few comments on this section. One suggested that the failure of the employee to initial the tamper-evident seals be regarded as a refusal to test. We do not think that that is the best solution to this problem. The individual has, after all, provided a specimen. By having the collector note the problem in the remarks line of the form, we preserve a record that the collection proceeded properly. In this section, we also clarify at several points that the collector, not the employee, performs several tasks.

Section 40.73 How Is the Collection Process Completed?

This section is based on § 40.75 of the NPRM. Commenters addressed a number of technical points. Some commenters wanted to put a time line in the section to expedite proceedings. We agree, and we have added a 24-hour/next business day requirement for transmittal of relevant copies of the CCF and the specimen itself. As another commenter suggested, we do encourage the immediate faxing of CCF copies to the MRO and DER.

A commenter asked that we specifically prohibit employees from providing medical information on the CCF. We agree, and we have spelled out this point in § 40.61(g). Another commenter suggested deleting the requirement for a ''box'' as the shipping container. We have deleted this requirement as a matter of flexibility, both here and in Appendix A, though we retain mention of a box as an example of something that can be a shipping container.

A commenter suggested that we eliminate the proposed requirement to note the entry for a specific courier or shipping service on the CCF. This requirement is part of the HHS CCF and instructions, so for consistency's sake we will retain it. However, we also specify in § 40.209 that omitting this information is not a fatal flaw.

As indicated previously, the shipping container seal was used primarily to seal the shipping container (box). Laboratories still tested the specimens when the shipping container seal was broken, provided the seals on the bottles remained intact. Based on this fact, we have removed the requirement for a shipping container seal to be placed on a shipping container. The same rationale applies to placing a shipping container seal on the plastic bag. The construction of the plastic bag is such that any tampering will be evident, even without the seal. Consequently, the final rule does not include any requirement for placing a shipping container seal across the opening of the plastic bag or for the collector to sign or initial and date such a seal.

Subpart F—Drug Testing Laboratories

Section 40.81 What Laboratories May Be Used for DOT Drug Testing?

The only comments on this section concerned the application of the PIE process to laboratories. Some laboratories and other commenters believed laboratories should not be subject to PIEs, since they are subject to HHS certification requirements. We believe that laboratories are service agents providing services to DOT-regulated employers no less than other parties subject to the PIE provision. Moreover, some Part 40 requirements affecting laboratories (*e.g.,* information release, conflicts of interest, validity testing requirement) are not enforced by HHS through its certification procedures. For these reasons, we believe laboratories should remain subject to the PIE process. However, we specify in § 40.365 that the Department does not intend, as a matter of policy, to initiate a PIE proceeding concerning a laboratory with respect to matters on which HHS has taken action under its certification process.

Section 40.83 How Do Laboratories Process Incoming Specimens?

We have added a provision to this section specifically requiring

laboratories to comply with HHS guidelines concerning accessioning and processing specimens. We do not believe it is necessary to duplicate significant portions of the HHS guideline provisions concerning laboratory processing of specimens, and we have therefore eliminated some provisions of the proposed Subpart F, such as § 40.87 and portions of this section and § 40.95.

Some commenters addressed the portion of the NPRM that discussed situations in which the color of the primary and split specimen differ. Because we will require a standardized collection kit using a single collection container, we believe that specimens failing to be color-coordinated should no longer be a problem, so we have deleted this provision. This material is covered in the HHS guidelines, so we do not need to repeat it here. We did incorporate a commenter's suggestion to direct the laboratory to retain a specimen for five working days while waiting for the correction of a correctable flaw.

A few commenters recommended that, when a laboratory notes that a split specimen is unavailable for testing, the laboratory should cancel the test then and there. We disagree. Most tests turn out to be negative, and employees do not request a test of the split specimen in all other cases. Therefore, there is a good probability that the test of the primary specimen will not turn out to be futile.

Section 40.85 What Drugs Do Laboratories Test for?

Section 40.87 What Are the Cutoff Concentrations for Initial and Confirmation Tests?

These technical sections have changed very little from the existing rule. A few commenters supported, and a few others opposed, allowing to test for other drugs (*e.g.*, barbiturates, benzodiazopenes, ''designer drugs'') in addition to the ''HHS five.'' This issue has been debated from the inception of the program. As the Department has said in the past, we believe the stability and reliability of the program are well served by limiting testing to the ''HHS five.'' HHS has established testing protocols and cutoffs for these drugs, and laboratories are subject to HHS certification for testing of these five drugs. This is not true for other drugs.

Section 40.89 Are Laboratories Required To Conduct Validity Testing?

Section 40.91 What Validity Tests Must Laboratories Conduct on Primary Specimens?

Section 40.93 What Criteria Do Laboratories Use To Establish That a Specimen Is Dilute or Substituted?

Section 40.95 What Criteria Do Laboratories Use To Establish That a Specimen Is Adulterated?

These sections are the laboratory-related provisions concerning validity testing. We discussed validity testing extensively in the ''Principal Policy Issues'' portion of the preamble, including issues pertaining to the scientific validity of adulteration and substitution criteria.

Section 40.89(b) states that laboratories continue to be authorized to conduct validity testing. This sentence is included to avoid anyone mistakenly concluding that, until validity testing becomes mandatory, there is a question about whether it can remain a voluntary part of the DOT drug testing program, as it is today. (The parallel section of the amendments to current Part 40, § 40.205(b), is for the same purpose.) When HHS issues its mandatory requirements on validity testing, DOT will amend § 40.89(c) to insert a date on which DOT will require all DOT specimens to be subject to validity testing. We would not make this date earlier than August 1, 2001, even if HHS issues its requirements before that date.

As noted in that discussion, this rule will not specify adulterants that must be tested, given the changes that can be expected in the popularity of various substances. However, we expect laboratories to be able to identify all those listed in up-to-date HHS guidance or rules. For example, we have not listed nitrites in this rule, but current HHS guidance calls on laboratories to test for nitrites. If nitrites cease to be a significant adulterant, and other substances arise to take its place, HHS guidance or rules will change as well.

One point we believe to be quite important is that laboratories should remain vigilant for new adulterants. If a laboratory finds a substance it cannot identify that appears to act as an adulterant or interfering substance, the rule directs the laboratory, after checking with another laboratory, to inform ODAPC and HHS about it. Doing so will enable us to react as quickly as possible to new adulterants being marketed.

We also note that, while the requirements for split specimen testing for adulterated and substituted specimens and MRO review will take effect within 30 days of the publication of this rule, mandatory validity testing is not required to begin until further notice from DOT. We will issue this notice in conjunction with the issuance by HHS of its mandatory requirements for validity testing. We hope that this will be on or before August 1, 2001. This should give those laboratories who currently are not conducting validity testing sufficient time to prepare to implement these requirements fully.

Section 40.97 What Do Laboratories Report and How Do They Report It?

This section is based on parts of proposed §§ 40.95 and 40.97. Some portions have been deleted as duplicative of HHS materials. The topic of greatest interest to commenters was the proposal to continue the current requirement that laboratories transmit test results directly to MROs, without using a C/TPA or some other party as an intermediary. C/TPAs made many of the same arguments on this point as they did with respect to the transmission of results from the MRO to the employer.

There is only one party in the DOT drug testing system who is entitled to see a confirmed laboratory result. That is the MRO. Other parties, including collectors, employers (except in a limited way if a stand-down waiver is granted), SAPs, and C/TPAs are not. These other parties are entitled to learn of a result *only* after the MRO has verified it. To permit a C/TPA to receive a confirmed laboratory result and then transmit it to the MRO would directly violate this key principle. We do not think that, in the present state of the health care industry, there should be serious problems with MROs having appropriate technology to receive results.

As discussed in the ''Primary Policy Issues'' part of the preamble, the Department has agreed to permit C/TPAs to act as intermediaries in transmitting results from MROs to employers. However, we believe that this situation is quite different from allowing C/TPAs to act as an intermediary in transmitting laboratory results to the MRO.

A number of commenters supported allowing the electronic transmission of result reports, especially negatives. Paragraph (b) of this section does permit considerable use of electronic methods. Beyond that, the Department will consider additional use of electronic methods through the advisory committee process discussed in the ''Primary Policy Issues'' portion of the preamble.

The NPRM mentioned transmitting negative results within 72 hours. Some commenters thought this period should be shortened to 24 or 48 hours, while one laboratory thought it would be too burdensome to use couriers on weekends to meet this goal. The final rule says that results should be transmitted to the MRO on the same day or business day after review by the certifying scientist is complete. Besides taking care of any weekend worries, this provision, in tandem with the use of electronic methods permitted under the rule, should result in expeditious transmission of results.

Section 40.99 How Long Does the Laboratory Retain Specimens After Testing?

We have simplified this section. Specimens which were positive, adulterated, substituted, or invalid must be kept for one year. In response to requests from commenters, we have provided that the laboratory must keep the specimens longer only if they receive a request from an employer, employee, MRO, C/TPA, or DOT agency representative. Absent such a request, the laboratory may discard the specimen. This rule applies to primary and split specimens alike. With respect to negative tests and specimens rejected for testing (*e.g.,* because of a fatal or uncorrected flaw), the laboratory should follow HHS guidance. We do not believe it is necessary to restate the guidance here.

Section 40.101 What Relationship May a Laboratory Have With an MRO?

This section focuses on potential conflicts of interest between MROs and laboratories. We discussed comments on this issue and the Department's responses in the ''Principal Policy Issues'' portion of the preamble.

Section 40.103 What Are the Requirements for Submitting Blind Specimens to a Laboratory?

The NPRM proposed to reduce the number of blind specimens employers and other program participants were required to send to laboratories. We made this proposal because it would reduce costs and burdens and because the laboratory testing program appears to be running very smoothly. Comments were divided on this issue. A majority of commenters, especially from employers and their groups, supported the proposal. Some said they had never heard of a laboratory error. Others said that blind specimen testing had outlived its usefulness and should be eliminated. On the other hand, a number of commenters said that to reduce the number of blind specimens would endanger the accuracy and integrity of the laboratory testing program.

We also received a number of comments saying that if we make validity testing mandatory, adulterated and substituted samples should also be included in the blind testing program. Some commenters expressed concern about being able to find adulterated blind specimens. A few comments from TPAs suggested that they should not have to send in blind specimens, even when they submitted more than 2000 specimens in the aggregate, because doing so should remain the individual employer's responsibility.

The Department believes the NPRM proposed a good balance between considerations of reducing burdens and maintaining an effective check on laboratory performance. We have had few if any laboratory accuracy problems over the history of the program, and we believe that we can continue to ensure that this pattern continues while reducing burdens and costs on participants. We agree that adulterated and substituted specimens should be made part of the blind specimen testing program, and we have consequently changed the proportions of specimens in the program to be 75 percent negative, 15 percent positive, and 10 percent adulterated or substituted. This is particularly important given the recent problems at some laboratories concerning validity testing. Given that this provision will not take effect until next August, we think that producers will have time to market adulterated and substituted blind specimens.

We believe that any organization that transmits to laboratories the requisite number of specimens in the aggregate should be responsible for participating in the blind testing program. This is true no matter whether the organization is an employer, a C/TPA, or some other service agent. The structure of the organization is irrelevant for this purpose. To decide otherwise would permit large gaps in the blind testing program. If 100 employers with 20 employees each are served by a C/TPA, and the C/TPA does not submit blind specimens, then no one will submit such specimens with respect to these employees, since each of the employers is too small on its own to be required to participate. Permitting this gap to exist would be disadvantageous from the program integrity standpoint.

We would also point out that C/TPAs, in virtually every other area of program administration, assert that they can perform a multitude of functions for everyone involved in the program. We do not see any compelling reason for looking differently at their involvement in blind specimen testing.

Section 40.105 What Happens if the Laboratory Reports a Result Different From That Expected for a Blind Specimen?

Some commenters objected to the proposed requirement for notification of DOT in the event of a laboratory error, or to the idea that ODAPC could direct laboratories to take corrective action. The main argument of these comments was that HHS had what they viewed as exclusive jurisdiction over testing matters, on which DOT should not infringe. We have refocused the section on unexpected blind specimen results.

The Department would always coordinate closely with HHS on matters affecting laboratories, as indeed we have done in drafting this provision. The fact remains that many MROs and other participants in the DOT program have their primary Federal agency relationship with DOT agencies, and it makes sense to have them report problems to DOT. It is also important to realize that testing laboratories, while certified by HHS, receive significantly more specimens as a result of the DOT program than as a result of the Federal employee testing program. Under these circumstances, a DOT role in noting and helping to correct any laboratory-related problems affecting the DOT program seems most appropriate.

Because we are requiring blind specimens in connection with validity testing, this section necessarily covers errors in validity testing.

Section 40.107 Who May Inspect Laboratories?

In response to comments, we are clarifying that the employers who may inspect laboratories are those who use or are negotiating to use its services for DOT-regulated testing.

Section 40.109 What Documentation Must the Laboratory Keep, and for How Long?

The Department has simplified this section and acted to reduce paperwork burdens, as a number of commenters recommended. All records supporting test results and those cited in § 40.111 must be kept for two years, unless an MRO, employer, employee, or DOT agency representatives requests an extension within the two-year period (*e.g.,* for litigation purposes). If no such request is received, the laboratory may discard the records.

Section 40.111 When and How Must a Laboratory Disclose Statistical Summaries and Other Information It Maintains?

The NPRM proposed to reduce paperwork burdens by reducing the reporting frequency for this information from quarterly to semi-annually. A number of comments supported this reduction. Other commenters favored eliminating the requirement altogether, or at least for small employers, on burden and cost reduction grounds. We believe that cutting the reporting burden in half is a sufficient burden reduction on this item and that even small employers will find summarized information on their workforce's participation useful. We underline the fact that the smallest employers, laboratories and C/TPAs will not experience the burden of sending ''non-reports,'' since there is no requirement to send a letter saying there is nothing to report unless specifically requested as part of a DOT audit. This will further reduce the paperwork burden of the rule.

Section 40.113 Where Is Other Information Concerning Laboratories Found in This Regulation?

This is a cross-reference section to inform readers where they may find other material relevant to laboratories' participation in the program.

Subpart G—Medical Review Officers and the Verification Process

Section 40.121 Who Is Qualified To Act as an MRO?

The Department believes that MROs play a key role in maintaining a fair and accurate drug testing program. Ensuring that MROs are in the best possible position to play this role requires, in our view, that they be well trained both in the substance of drug testing issues and the rules they are called on to apply. For these reasons, the NPRM proposed that MROs participate in a training course every two years or, in the alternative, self-certify that they have reviewed and understand these rules.

Commenters raised a number of issues. First, some commenters said that groups of health professionals other than physicians, like chiropractors, nurse practitioners, and physicians' assistants, should be able to be MROs. They perform other functions like physicians (*e.g.,* DOT physical examinations for commercial drivers) and are qualified to perform this one, commenters asserted. The Department does not agree with this assertion. That other health professionals have some training similar to that of physicians is undeniable, but the Department believes that the variety and depth of expertise needed to carry out MRO responsibilities effectively is unlikely to be found in other health professionals. There are clearly differences in the level of training needed to qualify for the various health professions, and we believe that only those professionals with the highest level of training should play this key role. Being qualified to perform routine physical examinations, for example, is not necessarily the same thing as being able to make capably the difficult judgment calls that MROs are called upon to make.

Second, many commenters disagreed with the proposal to allow self-certification of training. More formal training, including a certification program, was necessary, commenters said. Commenters pointed to three existing MRO training and certification programs as models for what the Department should require. These have a five-year retraining cycle, and a number of commenters thought that five years, as opposed to two, was sensible. On the other hand, a smaller number of commenters opposed additional training requirements for MROs, saying it would drive up the cost and difficulty of being an MRO, and hence reduce the supply of MROs available to employers.

The Department is modifying this section in response to these comments. We are persuaded that MROs, given their critical role, should not only have the highest professional credentials to begin with, but also receive formal training in the rules and decision process of their critical role in this program. Therefore, we are dropping the self-certification proposal of the NPRM. We will require MROs to take a formal training course, like one of the three national programs currently being offered. We will also require an examination administered by a nationally-recognized MRO professional certification board. We are not requiring ''certification'' of MROs, as such, however. While people who take the MRO courses typically get a ''certificate'' from the program, DOT is not certifying doctors in a way analogous to the way that the FAA certificates pilots. We believe that certification by professional organizations is beneficial, but we believe that there are sufficient market incentives for certification that we do not need to require it in this rule. Finally, we are adding a continuing education requirement to ensure that MROs keep up with changes and developments in the field and the DOT program.

The final rule establishes a phase-in period for this training requirement. For example, if a doctor is currently acting as an MRO, but has not yet had a formal training course, the doctor would have until January 2003 to meet the requirement. This should prevent any difficulty caused by lack of training sites or dates convenient for a particular physician.

Costs for existing MRO training courses tend to average around $750, including the examination, and the courses take a weekend. This low cost and time commitment suggest that this training requirement should not dry up the supply of MROs.

Like other participants, MROs would have to maintain their own documentation of training and qualification, which they must provide on request to representatives of the Department and employers and service agents who are using or negotiating to use their services.

One issue about which the Department inquired in the preamble to the NPRM concerned issues of MRO work that goes across state lines. Commenters expressed the concern that some state medical regulatory organizations may attempt to assert that only doctors licensed in a particular state could perform MRO services with respect to employees located in that state. The Department shares these commenters' concern. This is a national program, and MROs often perform their duties for employees located in many states. Consequently, this section specifically provides that a physician licensed to practice in any jurisdiction (*e.g.,* a state or province of the United States, Canada or Mexico, consistent with NAFTA requirements) and meeting other MRO requirements is authorized to act as an MRO with respect to employees located in any jurisdiction. We would regard any attempt by a state medical regulatory organization to limit the geographic scope of an MRO's work as pre-empted under the pre-emption provisions of DOT agency rules.

Section 40.123 What Are the MRO's Responsibilities in the DOT Drug Testing Program?

There were a few comments on this section. One commenter liked, and another disliked, referring to the MRO as a gatekeeper for the accuracy and integrity of the process. Another suggested that the MRO should be an advocate for the accuracy and integrity of the process. We have kept the gatekeeper term and added the idea of being a program advocate. As other commenters agreed, independence and

impartiality are essential to the MRO's role.

One commenter thought that the NPRM assumed, incorrectly, that MROs were solo practitioners. This commenter pointed out that there are MRO organizations with multiple MROs who perform drug testing program functions. We are very aware of this phenomenon, which is not surprising given the emphasis on group practice in today's health care industry. Nevertheless, each MRO retains individual responsibility for his or her actions. Groups don't verify test results; individual doctors do. It is the individual doctor who must make a decision and sign off on the result.

One employer organization was concerned that the NPRM placed in the hands of MROs tasks that, in its view, properly belong to the employer, like providing feedback to collection sites and laboratories on performance issues. We have added ''employers'' to the list of persons with whom it is appropriate for MROs to communicate. At the same time, however, we do not believe that it is consistent with the independence and impartiality of the MRO for employers to limit the contact of MROs with other parties.

In particular, we believe that no other party may legitimately attempt to interfere with the opportunity of an MRO to communicate with DOT agency representatives about drug testing program matters. For this reason, we have added language specifically prohibiting anyone from interfering with an MRO's access to DOT personnel or retaliating against an MRO for communicating with the Department.

We became convinced of the necessity of this provision, in part, because of an instance in which an MRO raised an issue about a decision of a major transportation employer, who had in turn been given questionable advice by a service agent. The MRO brought the matter to the Department's attention. The Department wrote a letter to the employer correcting its understanding of the issue in question. The employer responded by directing the MRO not to communicate with DOT and subsequently terminated the MRO's services. The Department wants to put all parties on notice that conduct of this kind is not permitted by the new regulation and in future will subject violators to enforcement action by DOT agencies, in the case of employers, or PIE proceedings, in the case of service agents.

As a number of commenters noted, since MROs will be involved in reviewing validity testing results, they will need to be prepared for the verification process in adulteration and substitution situations. This section now refers to this facet of the MRO's duties.

In addition, the rule does not deem MROs, in working with employees under this program, to have established a doctor-patient relationship with them. Doctors are not diagnosing or treating employees they encounter in their role as MROs; they are using their medical expertise to make decisions in the context of a forensic program. In the Department's view, drug and alcohol tests are not properly viewed as medical examinations or procedures, notwithstanding the involvement of medically-trained personnel in their administration.

Section 40.125 What Relationship May an MRO Have With a Laboratory?

This section is the reciprocal of § 40.101, prohibiting improper MRO-laboratory relationships. It refers to the same improper relationships listed in § 40.101 and directs MROs to sign a statement that they have no conflicts of interest or other improper relationships with laboratories.

Commenters generally concurred with this provision, agreeing with the need to keep MRO and laboratory functions separate. One commenter said that MROs should be able to provide a list of laboratories to customers and laboratories should be able to refer customers to MRO certifying organizations. We do not endorse this practice, though the names of HHS-certified laboratories and groups that train MROs are matters of public record that no one can be forbidden from sharing. Another commenter asked how the provisions of this section would be enforced. The answer is through the PIE process. Another commenter asked that we specifically prohibit having MROs or MRO staff within a lab facility. The list of prohibited relationships in § 40.101 includes this item.

Section 40.127 What are the MRO's Functions in Reviewing Negative Test Results?

Commenters raised two main issues concerning this section. While some commenters, mindful of the necessary role of the MRO in quality control for the testing process, supported MRO review of negative test results, most of those commenting said that the review requirements were too burdensome. It was not necessary for MROs to review 10 percent of negative results, they said, and this would raise costs that would be passed on to employers. These commenters appeared to view the processing of negative results as a simple administrative task that could safely be delegated to staff. If MROs were to review negative results at all, these commenters suggested, the amount of review should be reduced (e.g., to five percent or a numerical maximum).

Reviewing negative test result records is an administrative task, to be sure, and we anticipate that MRO staffs will do most of the work involved. But quality control is an important function for which MROs themselves must remain responsible. In response to comments, we will reduce the number of reviews by MROs to five percent of results, including all that have required some corrective action (*e.g.,* to fix a correctable flaw), to a maximum of 500 results per calendar quarter. This will reduce the potential burden on MROs, while retaining their oversight responsibility.

The second major issue was the proposed language that required review of negative results to be done by staff under the direct personal supervision of MROs. Some commenters objected to this language, believing it meant that MROs would have to be co-located with all staff and provide face-to-face supervision. This would be contrary to common working arrangements of service agents, they said.

The Department does not intend, through use of this language, to mandate that MROs must share the same physical space with all their staff members at all times. As commenters noted, direct personal supervision need not be physically face-to-face on an all-day, every day basis. Supervision can also take place through using a variety of electronic communications. However, the direct personal supervision must be meaningful. It involves personal oversight of staff members' work; personal involvement in evaluation, hiring, and firing; line authority over the staff for decisions, direction and control; and regular contact and oversight concerning drug testing program matters. It also means that the MRO's supervision and control of the staff members cannot be superseded by or delegated to anyone else with respect to test result review and other functions staff members perform for the MRO. In addition, CCFs may not contain fictitious addresses for MROs, and MROs must be personally involved with the review process when a confirmed positive, adulterated, or substituted result is received.

There were also some comments advocating the use of electronic means of transmitting negative results from MROs to employers. We agree, and provide for this in § 40.163. A number

of comments to this section also touted transmission of negative results to employers via C/TPAs, which we permit in § 40.165 and Appendix F. Some commenters also supported eliminating a requirement that the MRO have any copies of the CCF before verifying a negative result. We do not believe it is advisable to make this change, because it is important that the MRO have the MRO copy of the CCF. This allows the MRO to double-check the accuracy of a result to ensure, for example, that an employer does not allow someone to begin work in a safety-sensitive position on the basis of a mistaken or misidentified negative result on a pre-employment test. Instead, we have tightened the requirements for appropriate copies of the CCF to reach the MRO in a more timely fashion.

Section 40.129 What are the MRO's Functions in Reviewing Laboratory Confirmed Positive, Adulterated, Substituted, or Invalid Drug Test Results?

Virtually all the comment in this section concerned its references to the stand-down issue. The comments on this section were essentially the same with respect to proposed § 40.159, and we discussed this issue in the ''Principal Policy Issues'' portion of the preamble. Since we decided to allow employers to ask for a waiver to have a stand-down policy, this section now tells MROs either to inform the DER that there is a confirmed laboratory adulterated, substituted, invalid or positive test result (if the employer has a stand-down waiver in place) or to avoid telling the employer about such a result, pending verification (if there is no such waiver in place). Since MRO review will now apply to adulterated and substituted results as well as invalid and positive results, this section and all those that follow reference all four kinds of results.

Section 40.131 How Does the MRO or DER Notify an Employee of the Verification Process After a Confirmed Positive, Adulterated, Substituted, or Invalid Test Result?

Most of the discussion of this section concerned the proposed requirement, based on the Department's current rules and guidance, that MRO staff may make initial contacts with employees but not gather medical information or information pertaining to a legitimate medical explanation. A number of commenters said that staff, especially medically trained staff like physicians' assistants and nurses, should be able to perform these functions. This happens in the normal course of doctors' office and clinic work, they said, and would make the process less costly and more efficient. Other commenters thought the proposal was important for protecting employees' rights in the system.

The Department believes that this situation is distinguishable from the day-to-day operation of a doctor's office. We are talking here about a key function in protecting the constitutional rights and livelihoods of employees, a function that has no parallel in daily clinical work. Our experience is that, if employees talk to staff about substantive matters, they sometimes think they have talked to the MRO and need not have further contact with the MRO. They therefore do not take full advantage of the protections the rule makes available for them. We also are concerned that clinic staff may not have the background to talk effectively with employees about legitimate medical explanations for confirmed positive, adulterated, substituted, or invalid test results. Staff can still play a useful role by advising employees to gather all prescriptions and other information together so as to be prepared to have a productive discussion with the MRO, as well as by scheduling the discussion with the MRO.

We agree with commenters who pointed out that discussions with the MRO need not be in person. Most MRO operations use telephone contacts, and we have no objection to continuing that practice. We also agree with a commenter that, in instances where the MRO has been unable to contact the employee, MRO staff can contact the DER to take the next steps in the process.

The NPRM proposed that the MRO make at least two attempts to contact the employee over a 24-hour period. There was disagreement about this point. Some union and other commenters thought the period was too brief, while some employer and other commenters thought it was too long. We believe 24 hours is a reasonable middle ground that will provide a fair chance to contact the employee to exercise an important right while not allowing a situation to drag on interminably.

However, we have increased the minimum number of attempts to three, in order to provide a greater chance for attempts to contact the employee to be successful. These attempts need to be separated in time. It would be useless to call the employee, get no answer, and call back five minutes later to get no answer again. The attempts must be spread reasonably over the 24-hour period involved. There may also be circumstances in which the employee has provided incorrect phone numbers. If both phone numbers are ''bad numbers'' (disconnected, employee not known at that number), the MRO need not wait 24 hours to take the next actions the rules call for, since it would be futile to do so.

Section 40.133 Under What Circumstances May the MRO Verify a Test as Positive, or as a Refusal To Test Because of Adulteration or Substitution, Without Interviewing the Employee?

Commenters on this section were mainly concerned about time frames. While there was relatively little disagreement with the idea that the MRO could verify a test after 72 hours had passed from an MRO or DER contact with an employee (one commenter suggested 48), many commenters said that 14 days was too long a time for the MRO to wait before verifying a test when no one was able to contact the employee. A number of these comments suggested 5 or 7 days.

The Department will respond to these comments by shortening the time period to 10 days. We do not believe it is necessary to shorten the period further. Obviously, if the MRO or DER cannot contact the employee in that amount of time, either the employee is not performing safety-sensitive functions (*e.g.,* is away on vacation without a forwarding phone number) or is as unreachable to be pulled off safety-sensitive duties as he or she is with respect to talking to the MRO. There is no additional safety risk in either case.

Section 40.135 What Does the MRO Tell the Employee at the Beginning of the Verification Interview?

Commenters generally supported this provision, which tells MROs to inform employees about the verification process, what will be expected of the employee, and about what information can later be made available to employers and others. One commenter requested that MROs make explicit what specific medications might be reported to employers. This is potentially a very comprehensive list, and we do not believe that this suggestion is practical.

Section 40.137 On What Basis Does the MRO Verify Test Results Involving Marijuana, Cocaine, Amphetamines, and PCP?

One of the important provisions of this section, which the final rule makes explicit, is that employees bear the burden of proof that there is a legitimate medical explanation for the presence of these drugs in their specimens. One commenter asked that we not ''shift'' the burden of proof to the employee. There

is no ''shift.'' The employee has always had this responsibility.

Consistent with similar provisions in the validity testing context, we are requiring employees to present their explanation and supporting evidence at the time of the verification interview. The MRO's staff will already have told the employee to gather prescription and other relevant information for this purpose. This should help to expedite the verification process. However, if the employee persuades the MRO that there is a reasonable basis to believe that the employee can produce additional relevant evidence, the MRO can grant up to five additional days to produce the evidence. This is not mandatory: The MRO should grant more time only if it appears that there is a good reason to do so.

We agree with one comment that pointed out that there are no legitimate medical explanations for the use of PCP. This is also true of 6AM, a heroin-specific substance found in some opiate specimens. Section 40.151 now tells MROs not to accept any medical explanations for these substances.

The NPRM mentioned that an MRO could consider the employee's use of legally obtained foreign medication. One commenter objected to this provision. We believe it is appropriate to consider the fact that an employee obtained medication legally in a foreign country, when medically appropriate, even if that medication is not legally available in the U.S. To do otherwise could penalize legal, innocent conduct. We have adopted, as part of the rule text, the principles underlying the Department's existing guidance on the foreign medications issue.

We intend that, under this provision, MROs have broad discretion to determine whether the use of medications legally obtained within a foreign country should be viewed as a legitimate medical. In doing so, MROs must exercise their best professional judgment. MROs are neither required to find a legitimate medical explanation in any particular case nor prohibited from doing so (except to the extent that one of the principles set forth in this section requires the MRO to find that there was not a legitimate medical explanation). One of the reasons for the prominent position given MROs in the DOT drug testing program is precisely that we believe trained MROs are the best-equipped persons in the program to make these difficult medical judgment calls. We are confident that MROs will be thoughtful in considering the issues.

The rule articulates three principles for MROs use in exercising their discretion. First, there can be a legitimate medical explanation only with respect to a medication that is legally obtained in a foreign country. Second there can be a legitimate medical explanation only with respect to a substance that has a legitimate medical use. Even if one obtains a substance abroad legally, it cannot form the basis of a legitimate medical explanation if it does not have a legitimate medical use. For example, drugs of abuse like heroin, marijuana, and PCP have no legitimate medical uses, and they cannot form the basis of a legitimate medical explanation in any case. Likewise, use of substance which—if obtained in the United States—would not form the basis of a legitimate medical explanation (*e.g.,* hemp products, coca leaf teas) cannot form the basis of a legitimate medical explanation when obtained abroad.

Third, a foreign medication can form the basis of a legitimate medical explanation only if it is used consistently with its proper and intended medical purpose. When someone uses a medication, the person has an obligation to use the substance for its appropriate purpose and in keeping with medical instructions for its use. In addressing this issue, the MRO should look at a number of factors. Did the employee have a genuine medical need for using the substance (*e.g.,* an acute condition that arose while the employee was in the foreign country)? Did the employee use the medication for an appropriate medical purpose (*e.g.,* as opposed to using a medication intended for one purpose for a different, and inappropriate, purpose)? Is the quantity of the substance in the individual's specimen consistent with its proper medical use?

In applying these principles, it is very important for the employee to provide the MRO with adequate documentation. Travel documentation (visa, passport stamps, airline tickets, etc.) can help to check an employee's assertion that he or she was in the foreign country in question at the time he or she said the medication was obtained and/or consumed. Especially where a prescription drug is involved, discussions with a foreign physician or pharmacist are relevant to confirming the prescription for the foreign medication and the reason for it. It is important to note that, in some cases, drugs may be prescribed for purposes in foreign countries different from the purposes for which the medications are prescribed in the U.S. In the case of any foreign medication, the MRO should review documentation of purchase. Ultimately, it is the employee's burden to produce this information, though the MRO may need to be involved in some aspects of the effort, such as discussing medications with a foreign doctor.

In assessing situations in which an employee obtains a medication abroad and consumes it after returning to the U.S., the MRO should take special care to ensure that the employee is using the medication for its intended, appropriate medical purpose. Import and use of some medications in the U.S. may be inconsistent with U.S. drug laws or Customs rules. This heightens the concern that an employee who is using such a medication in the U.S. may not be doing so consistent with its appropriate, intended medical purpose. In particular, routine or frequent use of such a medication in the U.S., as distinct from a one-time or infrequent, inadvertent, or emergency use of the medication, may support an inference that an individual is not using the medication for its intended, appropriate medical purpose. If an employee should have consulted with a U.S. physician before using a foreign medication in the U.S., it can be relevant for the MRO to ask whether such a consultation took place. As a general matter, we view the U.S. use of foreign medication as more problematic than the use of the medication abroad, and we advise MROs to be more conservative in their determinations where U.S. use is involved.

As in cases involving drugs obtained domestically, verification of a test as negative does not end the MRO's job. If use of a substance, even though not a violation of DOT agency drug and alcohol testing rules, creates safety or fitness-for-duty problems, MROs have a mandate to report this information to employers (see § 40.327). An employee may be medically unfit for safety-sensitive duties because of the use of a legal medication, foreign or domestic.

Section 40.139 On What Basis Does the MRO Verify Test Results Involving Opiates?

Most of the discussion on this section concerned the use of the 15,000 ng/mL level of opiates in a specimen for shifting the burden of proof from the MRO (who in most opiate cases must show clinical evidence of unauthorized use) to the employee to show a legitimate medical explanation, as is the case in § 40.137 for other drugs. As noted in the preamble to the NPRM (see 64 FR 60980; December 9, 1999), the Department has good reason to believe that this is an appropriate level (*i.e.,* one high enough to avoid imposing an unfair burden on people who eat poppy seeds or otherwise engage in legal

activities for which there are not legitimate medical explanations).

Some commenters appeared confused about the relationship of this threshold to the 2000 ng/mL cutoff for a confirmed positive test result. The two are different, and they are used for different purposes. The latter establishes a confirmed positive test; the former establishes that the employee, rather than the MRO, has the burden of proof in the verification process. In one Canadian commenter's example, codeine medications are legally available in Canada, and might produce test levels in excess of 15,000 ng/mL. In such a case, the employee would have the burden of proof with respect to a legitimate medical explanation, which the employee could meet through showing that he or she had used a legal over-the-counter medication.

When an employee cannot establish a legitimate medical explanation for opiate levels (morphine or codeine) above the 15,000 ng/mL, then the MRO would verify the test positive. There would be no need for the MRO to find clinical evidence of unauthorized use.

A commenter suggested, and we agree, that the MRO or other physician's encounter with an employee to determine if there is clinical evidence of unauthorized opiate use is better styled an ''examination'' than an ''interview,'' and we have changed the language accordingly.

The Department notes that a situation could arise in which the primary specimen is positive for opiates and 6–AM. The MRO verifies the test as positive, without determining whether there is a legitimate medical explanation or clinical signs of unauthorized use, since these steps are not necessary when a specimen is positive for 6–AM. The split specimen reconfirms the presence of opiates but not the presence of 6–AM.

In this case, the test would not be cancelled. Rather, the MRO would take additional verification steps. If the amount of morphine or codeine in the primary specimen were 15,000 ng/mL or more, the MRO would ask the employee to provide information on any legitimate medical explanation there might be for the presence of the opiates in the specimen. If the amount of morphine or coedine were less than 15,000 ng/mL, the MRO would examine the employee for clinical signs of unauthorized use or refer him or her to another physician for this purpose. The MRO would then make a decision about whether to verify the result as positive. The MRO would make this decision without reference to 6–AM, since the specimen had failed to reconfirm for 6–AM.

Section 40.141 How Does the MRO Obtain Information for the Verification Decision?

There were few comments to this section. One that we adopted suggested that in addition to reviewing evidence on its face, the MRO should take all reasonable and necessary steps to verify the authenticity of the evidence. We have deleted a provision authorizing the MRO to tell the laboratory to conduct a reanalysis of the primary specimen. Because this rule no longer provides for single specimen collections, we believe that this language is superfluous. Reanalysis of the primary specimen is no longer authorized.

Section 40.145 On What Basis Does the MRO Verify Test Results Involving Adulteration or Substitution?

This section adds MRO review provisions concerning the results of validity tests. The basic policy issue of MRO review for validity testing was discussed in the ''Principal Policy Issues'' section of the preamble, which also describes the provisions of these sections. As noted above, MRO review of validity testing results will begin 30 days after the publication of this rule.

One point we want to emphasize is that it is not enough for an employee to come up with a reason that allegedly accounts for the result (*e.g.,* a medical condition, personal characteristics, proximity to a chemical). To meet his or her burden of proof, the employee must demonstrate a link between the alleged reason and the ability to physiologically produce the laboratory result obtained. For example, if an employee shows he has medical condition X, then he must also show a medical/scientific basis for getting from X to a creatinine result below 5 and a specific gravity below 1.001. If the employee shows he had topical exposure to chemical Z, he must also demonstrate medical/scientific evidence that topical exposure to Z in the concentration he experienced leads to the physiological production of the levels of Z in his specimen that the laboratory found. Any such evidence must meet medical/scientific criteria for controls, methodology etc., in order to have credibility.

In any case in which the MRO cancels an adulterated or substituted test result because the employee has established a legitimate medical explanation, the MRO must make a written report to ODAPC. The purpose of this report is to permit ODAPC and HHS to examine the circumstances. This examination could lead to additional guidance to MROs or laboratories concerning the matters that led to the cancellation. ODAPC would not, in such a case, act as a ''court of appeals'' that would overturn the results of the MRO review process.

Under the final rule, the MRO reviewing an adulterated or substituted test result could direct the employee to obtain, within 5 days, a further medical evaluation from someone with expertise in the medical issues raised by the employee's explanation. This individual could be a specialist in a particular field of practice, but need not be. What is important is that the referral physician have enough expertise to deal effectively with the particular issues in the case.

The Department is aware that, in some cases, it may be difficult for an employee to secure, on his or her own, an appointment for this evaluation in a short period of time. Consequently, the Department does not regard it as a refusal to test if the employee is unable, after making good faith efforts, to get the appointment within the 5-day period. However, the MRO and the employer should do everything feasible to assist the employee in finding and getting an appointment with an appropriate physician.

Section 40.149 May the MRO Change a Verified Positive Drug Test Result or Refusal To Test?

This provision is based on proposed § 40.161. There were relatively few comments. A small number of commenters suggested that the employer should be able to change an MRO's action the employer believed to be erroneous, perhaps by referring the matter to another MRO for a second opinion. We do not believe that it would be advisable to authorize this sort of forum shopping. Under the new regulation, MROs will be even better trained in their duties. It would erode the finality of MRO's decisions and the protections the MRO system affords to employees to allow employers a second bite at the apple.

Some commenters also believed the 60-day period during which an MRO could reverse a decision he or she had made was too long. One commenter thought that 14 days was a more reasonable time period. The point of this provision is to allow employees to present evidence that was not originally available. There need be no rush to foreclose this opportunity, which has no adverse safety implications, since the MRO will have already communicated the verification decision to the employer, who will have removed the employee from safety-sensitive duties. We will leave this provision unchanged, except to add a reference to adulteration and substitution cases.

Here is a hypothetical case illustrating how the provision would work, in concert with the five-day extension provision of the §§ 40.137 and 40.145. The MRO interviews the employee, who says she has a legitimate medical explanation. She asks for, and receives, a 3-day extension to find evidence of the explanation, but is unable to do so. The MRO verifies the test as a refusal because of adulteration or substitution. The MRO reports the verified refusal result to the employer, who removes the employee from safety-sensitive duties.

Six weeks later, she returns to the MRO with additional data, including a study performed by the referral physician, acceptable to the MRO, who she has retained. The study, performed under carefully controlled conditions, shows that the employee was able to replicate the laboratory result through physiological means. The MRO determines that this is a legitimate medical explanation and, after discussing the matter with ODAPC, reverses the original verification result. At this point, the employee no longer has an obligation to complete the return-to-duty process before working again in a safety-sensitive position.

Section 40.151 What Are MROs Prohibited From Doing as Part of the Verification Process?

This section is based on § 40.143 of the NPRM. There was little comment. A few comments recommended that MROs should be able to consider evidence extrinsic to the testing process, such as procedural errors not reflected on the CCF, tests of additional specimens (*e.g.,* a hair test), or use of ''medical marijuana'' in a state with a law authorizing such use. The Department is not adopting these suggestions, which would authorize collateral attacks on the validity of the testing process. This regulation prescribes the testing process; if the procedures in a given test meet this part's requirements, that is enough to make the test valid. The MRO should not go beyond the rule's requirements to accept other reasons to cancel a test.

We do not believe it is appropriate to place MROs in the position of having to decide factual disputes between employees and collectors about what did or did not occur at the collection site (*e.g.,* allegations that the collector left the area or left open urine containers where other people could access them) or about whether someone was properly selected for testing. Therefore, this section directs MROs not to become involved in issues extrinsic to the documents in reviewing the CCF. We do not intend, through this provision, to preclude MROs from taking action to cancel a test if the MRO determines that a fatal flaw has occurred in the testing process.

We have, as some commenters suggested, added provisions related to validity testing. Certain substances cannot be produced physiologically in urine, and urine cannot have a zero creatinine content. Likewise, there is no legitimate medical explanation for PCP or 6–AM. The rule specifies that MROs cannot find that a legitimate medical explanation exists in these circumstances. Following a commenter's suggestion, we have also added coca leaf tea explanations to the same category of explanations (along with use of hemp products) that MROs may not accept.

Section 40.153 How Does the MRO Notify Employees of Their Right to a Test of the Split Specimen?

Commenters said that if, as § 40.145 of the NPRM proposed, MROs tell employees with verified positive, adulterated, and substituted tests (1) that they have a right to a test of the split specimen if they make a timely request, and (2) that they are not required to pay for the test from their own funds before the test takes place, then employees will frequently request tests of split specimens. This, in the view of a significant number of commenters, would be a bad thing: Few split specimens fail to reconfirm and testing them is an expensive annoyance that merely serves to delay the inevitable. On the other hand, as one commenter suggested, requiring advance payment from the employee's own funds would have the benefit of eliminating most split specimen tests, since they are most often a ploy used by a guilty employee in the hopes that the split is unavailable for testing or that the specimen will not reconfirm.

The problem with these commenters' analysis is that a test of a split specimen is a right guaranteed to employees by the Omnibus Transportation Employee Testing Act. We agree with commenters that if we do not make employees aware of this right and permit employers to financially deter employees from exercising it, then fewer employees are likely to request a test of the split specimen. However, we must disagree with the proposition that reducing the frequency of requests of a test of the split specimen is an appropriate objective.

When Congress guarantees a right to employees (and we believe we must treat all DOT-regulated employees in our program alike, even if they are not covered by the Omnibus Act), our obligation as a Federal agency is to faithfully execute that legislative decision. The statute provides a series of other protections to employees as a matter of right, such as the use of an HHS-certified laboratory and resort to MRO review for the five HHS drugs. An employer could not say that employees could have their specimen tested at an HHS laboratory only if they paid in advance a higher price to have their specimen tested there instead of a local hospital. Nor could an employer say that it would make MRO review available only if the employee paid in advance for the MRO's services. The same rationale applies to a test of the split specimen. When the statute and rule say that a certain procedure must be made available to an employee, then the employer is responsible for making it happen.

Through collective bargaining or subsequent attempts at securing reimbursement, an employer may seek to have the employee ultimately pay part or all of the cost of a split specimen. But when the employee with a verified positive, adulterated, or substituted test result makes a timely request for a test of the split specimen, it is required that the test take place, and this requirement cannot be made contingent on advance payment by the employee. The Department will retain its NPRM language on this point. (This approach is consistent with the Department's longstanding interpretation of the current rule.)

Another issue in the comments was how to define ''timely.'' The NPRM, like the present rule, says the right to a test of the split specimen is triggered if the employee makes the request within 72 hours of being notified by the MRO of a verified positive test. On request of a number of commenters, we are making explicit that it is the notification of the verified test result that starts this time period running. Some commenters pointed out that RSPA would have to change its rule (which currently permits up to 60 days for such a request) to be consistent with this provision. RSPA will propose such a change as part of its conforming amendments to this rule.

Employers also asked whether they may take action during this 72-hour period. In fact, employers must remove employees from safety-sensitive duties as soon as they are notified of a verified positive, adulterated, or substituted test result. In addition, employers are free to take personnel action once they receive the verified result, although we believe it would be wise to avoid taking final action (*e.g.,* termination) until the 72 hours are up or, where the employee requests a test of the split specimen, until the MRO reports the second

laboratory's split specimen test result to the employer. Nothing requires the employee to be in paid status during this period, in any case.

A number of commenters noted that MROs sometimes authorize tests of the split specimen well after the 72-hour period has elapsed (*e.g.,* weeks or months later). Nothing in the rule precludes an MRO from doing so. However, an employee has a right to a test of the split specimen only if he or she requests it within 72 hours. The employee cannot insist on having the split specimen tested after that time, and the employer is not obligated, financially or otherwise, to make the test happen.

A few commenters suggested that the request for a test of the split specimen should be made in writing. It seems to us that a careful employee would make a written request, in order to have his timely request on the record. But we do not think it is necessary to require this action. Another commenter thought that the rule should not direct the MRO to tell employees that DNA or other tests are not authorized. The Department believes that this provision is beneficial as a means of avoiding unnecessary requests for these tests, and we have retained it.

Section 40.155 What Does the MRO Do When a Negative or Positive Test Result Is Also Dilute?

This section is based on proposed § 40.147 of the NPRM. There was little comment on this section, most of which concerned the issue of whether a dilute specimen should be an occasion for a recollection under direct observation. Such a recollection is not necessary in the case of a test result that is both positive and dilute. For a test that is both negative and dilute, we have decided (see § 40.197(b)) to allow the employer the discretion to conduct an immediate recollection, but not under direct observation, since there can be many innocent reasons for a dilute specimen. This is a change from the existing rule, which permitted tests under direct observation on the next occasion when the individual would be tested (*e.g.,* in the random program).

Section 40.159 What Does the MRO Do When a Drug Test Result Is Invalid?

This section is based on § 40.151 of the NPRM. Consistent with HHS guidelines, we are using the term ''invalid'' rather than ''unsuitable for testing'' to describe such test results. There were a variety of comments on this section. Some commenters thought we should treat invalid tests as refusals to test, the same way we treat adulterated and substituted tests. Another commenter thought it would save time and effort if we simply cancelled invalid tests, with an unannounced recollection under direct observation, rather than going through the MRO inquiry process proposed in the NPRM.

We believe that the Department chose a reasonable middle ground in the NPRM, and we will use this approach in the final rule. When an adulterant has not identified, it has not been conclusively shown that the employee has tampered with the specimen. Recollection under direct observation is an appropriate response to the suspicion of tampering that an invalid result raises. On the other hand, there may be medical reasons for an invalid result. Where these exist, it would be unfair to impose a directly observed collection on the employee.

A commenter suggested that, when an employee admits to adulterating or substituting a specimen, the MRO get a written statement from the employee or make his own contemporaneous written statement of the employee's admission. We think that having the MRO document such admissions is a good idea, and we have added it to paragraph (c).

Section 40.161 What Does the MRO Do When a Drug Test Specimen Is Rejected for Testing?

This section is based on § 40.155 of the NPRM. Most comments were to the effect that it was unnecessary to have the MRO investigate the reason for the rejection, which commenters said was usually obvious. In response, we have removed this requirement and simplified this section. It now just recites the paperwork steps the MRO follows when he or she receives a rejected result.

This section no longer calls for a recollection following a rejected result. There does not seem to be any strong reason for requiring a recollection because of what, in most cases, is an administrative error. Of course, in situations (*e.g.,* pre-employment) where a negative test result is required, there will have to be another test in order to attempt to obtain the negative result.

Section 40.163 How Does the MRO Report Drug Test Results?

Section 40.165 To Whom Does the MRO Transmit Reports of Drug Test Results?

Section 40.167 How Are MRO Reports of Drug Results Transmitted to the Employer?

These sections are all based on proposed § 40.157. We split the proposed section into three parts to make it easier to understand. The greatest number of comments on the proposed section concerned the use of C/TPAs as intermediaries to transmit results from MROs to employers. We discussed this issue in the ''Principal Policy Issues'' portion of the preamble and incorporated our decision in § 40.345. Section 40.165 of the new rule references this decision, by saying that the MRO transmits results either to the DER or to a C/TPA acting as an intermediary. We emphasize that it is the employer's choice that determines whether the MRO transmits the information directly or permits a C/TPA to act as an intermediary.

A number of comments concerned the electronic transmission of results (*e.g.,* by fax or secure computer link). Electronic signature issues were also raised in this context. The Department's advisory committee will take up these issues in greater detail. For now, we will retain the NPRM language that telephone contact is the preferred means for transmitting non-negative results. We also note that one commenter appeared to misunderstand proposed § 40.157(b)(3), which has become § 40.167(c)(3) in the final rule. We do not require the MRO's verbal report to include all the points required in the documentation of the report, which must follow the verbal report. We have also decided to delete the information item concerning the address of the collection site, because we do not believe it is necessary for this report.

Some commenters felt that the report format was too complex and would lead to practical difficulties. In connection with the new CCF, we have simplified these requirements. All reports can be made on a stamped (negatives) or signed (all other results) copy of Copy 2 of the CCF. Otherwise, the MRO must compose a letter with several information items for each result. We prefer that MROs use copies of Copy 2 of the CCF for this purpose, which will result in generating much less paperwork.

Section 40.169 Where is Other Information Concerning the Role of MROs Found in This Regulation?

This is another in the series of sections providing, for readers' convenience, references to other sections of the regulation that concern, in this case, the role and activities of MROs.

Subpart H—Split Specimen Tests

Section 40.171 How Does an Employee Request a Test of a Split Specimen?

There were few comments on this section. A number of commenters wanted to require that requests for tests of split specimens be in writing. One reason given for this request was that some employees, if the split specimen test reconfirmed, would deny asking for the test when the employer asked for reimbursement. We do not think it necessary to require these requests to be in writing, which in some instances could delay or burden the employee's right to have the split specimen retested. However, so that there is a written record of the request, the NPRM and this final rule direct MROs to document the date and time of the employee's request.

Section 40.173 Who Is Responsible for Paying for the Test of a Split Specimen?

This section is related to the provision concerning payment for split specimen tests in § 40.153, and commenters took very similar positions on the issues. Not surprisingly, unions and some service agents liked the proposal better than employers. The Department's rationale for incorporating this provision in the final rule is essentially the same as discussed under § 40.153 above. Employers did want assurance that they could seek reimbursement from employees, and paragraph (c) of both the NPRM and final rule makes that point clear. We added an example of how employers could ensure that testing occurs on time (establishing accounts with laboratories, which they could do on their own or through a C/TPA).

Section 40.175 What Steps Does the First Laboratory Take With a Split Specimen?

There were few comments concerning this section. Some commenters asked that tests be cancelled when a split specimen was unavailable. For reasons discussed above, the Department believes it is better to test the primary specimen in such cases. Some commenters addressed proposed § 40.175(c), which we have deleted because it duplicated laboratory procedure matters in HHS guidance. Laboratories will follow this HHS guidance with respect to specimen retention requirements. Commenters asked for clarification of who gets to choose the laboratory that tests the split specimen. This is an issue on which the Department does not have a position. We are satisfied as long as the parties use an HHS-certified laboratory.

Section 40.177 What Does the Second Laboratory Do With the Split Specimen When It Is Being Tested To Reconfirm the Presence of a Drug or Drug Metabolite?

Section 40.179 What Does the Second Laboratory Do With the Split Specimen When It Is Being Tested To Reconfirm an Adulterated Test Result?

Section 40.181 What Does the Second Laboratory Do With the Split Specimen When It Is Being Tested To Reconfirm a Substituted Test Result?

These sections are all based on proposed § 40.177. Most of the comments on proposed § 40.177 concerned the addition of validity testing to the split specimen portion of the program, discussed in greater detail in the ''Primary Policy Issues'' portion of the preamble.

Existing HHS guidance (Program Documents 35 and 37) establish criteria for testing of the primary specimen for adulteration and substitution. These are the criteria referenced in §§ 40.93 and 40.95. These Program Documents do not, on their face, apply to testing of the split specimen. HHS is planning to incorporate split specimen testing criteria for adulteration in forthcoming mandatory requirements for validity testing. Pending completion of this formal HHS issuance, and because we believe it is important to begin split specimen testing in the validity testing program as soon as possible, the Department in §§ 40.179 and 40.181 is requiring that the split specimen meet exactly the same criteria as the primary specimen in order to be considered reconfirmed. These criteria already exist in HHS guidance (Program Documents 35 and 37) and have a sound technical basis. When HHS issues its final mandatory requirements for split specimen tests in adulteration and substitution cases, the Department will, if necessary, amend these provisions to refer to the HHS issuance.

Section 40.183 What Information Do Laboratories Report to MROs Regarding Split Specimen Results?

This section is based on proposed § 40.181 of the NPRM. There were no substantive comments. We have adopted the section as proposed, except that we have added notations applicable to split specimen tests in adulteration and substitution situations. We also clarified that laboratories must sign and date the appropriate CCF copy.

Section 40.185 Through What Methods and to Whom Must a Laboratory Transmit Split Specimen Results?

This section is based on proposed § 40.179 of the NPRM. Comments focused on two issues: the use of electronic means of transmission and use of service agents as intermediaries between laboratories and MROs. In response to comments favoring greater use of electronic means, the final rule will permit results to be sent by electronic image, as well as other means. However, for the same reasons applicable to transmission of primary specimen test results, we will not permit C/TPAs to receive split specimen results from laboratories.. Laboratories must promptly send split specimen results directly to MROs.

Section 40.187 What Does the MRO Do With Split Specimen Laboratory Results?

This section is based on proposed § 40.183 of the NPRM. Some commenters objected to a retest under direct observation as the consequence of a failure to reconfirm due to the unavailability of the split specimen for testing. As noted above, this situation involves strong evidence of a violation of the rules (*e.g.,* a verified positive test), with the test being cancelled only because of a process problem (*e.g.,* the split leaked away). In this situation, there is a stronger than usual incentive for the employee to attempt to beat the next test, hence the need for direct observation on the recollection.

The Department deleted proposed § 40.185, concerning retests of single specimen collections, since all collections under the new rule will be split specimen collections.

Section 40.189 Where Is Other Information Concerning Split Specimens Found in This Regulation?

This is another in the series of cross-reference sections designed to help readers find related material.

Subpart I—Problems in Drug Tests

Section 40.191 What Is a Refusal To Take a DOT Drug Test, and What Are the Consequences?

If an employee declines to take a drug test or takes a number of other actions that obstruct the drug testing process, the employee is deemed to have refused to test. For the most part, the consequences of a refusal are the same

or more severe as for any other violation of DOT agency drug and alcohol regulations.

Commenters generally agreed with the list of actions in this section that constitute a refusal to test. One commenter wanted refusals on non-DOT tests to count as refusals under this part. They cannot, because this part does not require anyone to take a non-DOT test. A few comments also urged use of alternative testing technologies, such hair testing and on-site testing, in potential refusal situations. The Department will defer to HHS on alternative testing technology issues. HHS has not yet authorized these approaches to testing. We have added a specific reference to verified adulterated or substituted test results as a ground for determining that an employee has refused to test.

Section 40.193 What Happens When an Employee Does Not Provide a Sufficient Amount of Urine for a Drug Test?

This is the so-called ''shy bladder'' provision of the rule. The proposed section would keep the core of the Department's current shy bladder procedures in place, and commenters did not question the direction of this provision. Commenters did address a number of specific issues concerning the section. Some commenters wanted to specify that the physician performing an evaluation of potential medical reasons for a shy bladder situation be a urologist or other specialist, on the theory that a non-specialist was not as well equipped for this function. The Department agrees, and, in parallel with the language concerning MRO review of adulteration and substitution provisions, the final rule calls for the use of a licensed physician with expertise in the medical issues surrounding a failure to provide a sufficient specimen.

Commenters disagreed about who ought to select the physician for this evaluation. Some said the referral physician should be acceptable to the employer. Others said the referral physician should be acceptable to the employee. We take the view that the rule should not specify who makes the selection of the referral physician, but we do think that he or she should be acceptable to the MRO. The MRO is in a better position than either the employee or the employer to determine if a particular referral physician is appropriate to this task.

Under the final rule, the an employee in a shy bladder situation would be directed to obtain within 5 days, a further medical evaluation from someone with expertise in the medical issues raised by the employee's situation. This physician could be a specialist (*e.g.,* a urologist), but need not be. What is important is that the referral physician have sufficient expertise to deal effectively with the medical issues in the employee's case.

The Department is aware that, in some cases, it may be difficult for an employee to secure, on his or her own, an appointment for this evaluation in a short period of time. Consequently, the Department does not regard it as a refusal to test if the employee is unable, after making good faith efforts, to get the appointment within the 5-day period. However, the MRO and the employer should do everything feasible to assist the employee in finding and getting an appointment with an appropriate referral physician.

Commenters raised in this context the issue of whether a refusal to drink fluids in a shy bladder situation should constitute a refusal to test. We do not believe that a refusal to drink fluids should be considered a refusal to test, and we have incorporated this view into the text of this section.

Some commenters suggested that, during the five days that may elapse between an employee's provision of an insufficient specimen and the determination of whether this constitutes a refusal to test, the employee should be stood down from performing safety-sensitive functions. We are not adopting this suggestion. Until and unless a refusal is determined to have occurred, there is no evidence of violation of the rules on which to base a temporary removal from performance of safety-sensitive duties (unlike the situation under a stand-down waiver, where there is the evidence of a confirmed positive test).

A few comments questioned the three-hour waiting/fluid consumption period following an employee's provision of an insufficient specimen. One comment said blood should be drawn after two hours. Other comments said it made more sense to go immediately to an alternative specimen, such as saliva or hair. We believe that the three-hour period is by now well established in the DOT program, and comments did not make a compelling case for changing it. As noted above, we are waiting for HHS action before making any further decisions concerning alternative specimens.

We incorporated in this section an existing DOT interpretation concerning psychological conditions alleged as reasons for a failure to provide a sufficient specimen. The meaning of this interpretation (see paragraph (e)) is that to be regarded as a pre-existing psychological disorder, it is not necessary that the condition be diagnosed before the time of the test, but the symptoms have to have been medically documented before the time of the test. For example, an individual may have brought urination problems to the attention of his urologist over a period of time, but the urologist did not enter a specific diagnosis of a psychological disorder into the medical records. In this situation, the examining physician has the discretion to determine that there was a pre-existing psychological condition, if the physician is convinced that the medically documented symptoms support such a diagnosis.

Section 40.195 What Happens When an Individual Is Unable To Provide a Sufficient Amount of Urine for a Pre-Employment or Return-to-Duty Drug Test Because of a Permanent or Long-Term Medical Condition?

This section is intended to address a rare, but difficult, issue that may arise in these types of testing. In a pre-employment or return-to-duty test, an employee who is not now performing safety-sensitive duties must have a negative test result in order to begin or resume performing safety-sensitive duties. In a ''shy bladder'' situation, if there is an adequate medical reason for the inability to provide a sufficient specimen, the test result is cancelled, not negative. If a permanent or long-term medical condition is the cause of the inability to provide a sufficient specimen, the employee might never be physically capable of obtaining a negative result. This could be very unfair to the employee, and it could raise Americans with Disabilities Act issues as well.

Some commenters expressed the view that this provision should apply to other types of testing as well (*e.g.,* random). We do not believe it is necessary to do so, because employees in these situations do not need a negative test result to perform safety-sensitive functions. A cancelled test is not a violation of DOT rules that compels employers to remove employees from safety-sensitive duties.

In response to a comment, we added language that the MRO can conduct, or cause to be conducted, the further medical evaluation the section requires. We have also clarified that, as part of this evaluation, the physician may use alternative testing methods, including but not limited to blood testing, to help determine whether the employee shows clinical evidence of drug abuse. Particularly given that we do not apply

this procedure to random testing, we do not agree with a suggestion that an individual covered by this section should be taken out of the random testing pool. Doing so would also affect the probability that other individuals would be selected for testing. As in other situations calling for medical evaluations, the rule requires that the physician conducting the evaluation be acceptable to the MRO, rather than to the employer or employee.

Under this section and § 40.193, the referral physician reports to the MRO the basis for any conclusion that the individual has a permanent, long-term disability that prevents providing a sufficient specimen. However, for privacy reasons, neither the referral physician or the MRO passes on to the employer any information about the nature of the disability. The employer is simply told that there is a permanent, long-term condition.

We have not included similar language in the rule concerning alcohol testing, because pre-employment alcohol testing is not mandatory. In the rare situation in which an employee is required to have a negative alcohol test in a return-to-duty or follow-up test situation, and could not produce sufficient breath because of a permanent, long-term disability, we would apply the reasoning of this section to that situation.

Section 40.197 What Happens When an Employer Receives a Report of a Dilute Specimen?

This section is based on §§ 40.147(a) and 40.159(d) of the NPRM. The NPRM, like the existing rule, would have given employers discretion to use direct observation the next time the employee was selected for testing (e.g., in random testing). Comments on this issue and the Department's responses are discussed under ''Collection Issues'' in the ''Principal Policy Issues'' portion of this preamble. It should be noted that, unlike the existing rule and the NPRM, this provision authorizes a new collection immediately following a negative-dilute result, rather than on the next occasion when an employee is selected for testing. This recollection is not conducted under direct observation.

Section 40.199 What Problems Always Cause a Drug Test to be Cancelled?

This section, listing ''fatal flaws'' that invariably result in the cancellation of a test, is based on § 40.197 of the NPRM. The list of fatal flaws in the final rule is somewhat different from that in the proposed rule. Proposed paragraph (b), concerning the lack of a specimen ID number, is really an instance of the flaw cited in paragraph (a), a mismatch between the specimen ID numbers on the specimen bottle and the CCF. The former is included in the latter, so we have deleted the proposed paragraph (b). Consistent with HHS guidelines, we have added a new paragraph (b), concerning a situation in which the printed collector's name and collector's signature are both missing. This section's list of fatal flaws is now consistent with the HHS list of fatal flaws.

A few comments suggested either that fatal flaws automatically cancel a test, without MRO involvement, or that the employer have the authority to cancel a test when a fatal flaw appears. We believe that, as the key ''gatekeeper'' and quality control person in the system, the MRO is the best party to make the actual pronouncement of a cancellation based on a fatal flaw. Another comment suggested that an error in the chain of custody documentation should result in the cancellation of a test. The problem here is that not all errors are created equal. Depending on the seriousness of an error and our ability to fix it, an error on the CCF can be a fatal flaw, a correctable flaw, or a *de minimis* error that does not result in cancellation.

Finally, a commenter asked whether Bottle B may be redesignated as Bottle A, as the final paragraph of this section suggests. This has been an interpretation issue under the existing rule, but we are clear in this final rule that such redesignations can take place.

Section 40.201 What Problems Always Cause a Drug Test To Be Cancelled and May Result in a Requirement for Another Collection?

This section is based on § 40.199 of the NRPM. One commenter suggested treating invalid test results as refusals. As we have discussed above, the Department did not adopt this suggestion. There were no other substantive comments on this section, which we have adopted with some editorial changes and the addition of a paragraph pertaining to the failure of an adulterated or substituted result to reconfirm.

Section 40.203 What Problems Cause a Drug Test To Be Cancelled Unless They are Corrected?

This section is based on § 40.201 of the NPRM and concerns ''correctable flaws.'' Commenters generally approved the proposed provision, but had varied suggestions. As in the case of fatal flaws, one suggestion was to allow employers to cancel tests in the case of an uncorrected flaw. As we said in that case, we believe that MROs are the best party to take all such actions in the drug testing program. Two commenters disagreed concerning the situation of a missing employee signature coupled with a lack of collector notation of the omission: one said it should be a fatal flaw and the other said it need not be even a correctable flaw. We believe that the NPRM formulation of making this situation a correctable flaw makes the most sense, giving due regard both to the need for completeness of the documentation and the ability to work around inadvertent administrative mistakes.

A commenter suggested that an incorrect employee social security number (SSN) or other ID number (*e.g.,* a transposition of numbers) should not be a fatal or correctable flaw. We agree with this comment. We also believe that a minor transposition error is the kind of irregularity that would not cause a test to be cancelled (see § 40.209). If an ID number is completely wrong (*e.g.,* appears to be a different number altogether) is too badly garbled to be useful in establishing the employee's identity, we view the number as having been omitted, which is a correctable flaw under paragraph (c). Another commenter suggested that the combination of a wrong ID number and a missing employee signature should be a fatal flaw. In our view, both of these items independently are correctable flaws, meaning that if either is left uncorrected the test is cancelled. This is a sufficient safeguard, we believe.

Section 40.205 How Are Drug Test Problems Corrected?

This provision is based on proposed § 40.203 and concerns how correctable flaws and other problems are corrected. There were few comments on this section. One commenter said there should be a time limit (*e.g.,* five days) for making corrections, and that errors should be taken into account during verification. We agree that corrections should be timely, and while we do not believe that an absolute ''statute of limitations'' is appropriate, we have added language directing parties to supply this information on the same business day on which they are notified of the problem, transmitting it by fax or courier. Aside from fatal or uncorrected flaws that cause a test to be cancelled, there is no role for consideration of these kinds of mistakes in the verification process, which focuses on whether there is a legitimate medical explanation for a test result.

Another comment suggested that the use of a non-DOT form could be corrected by annotating the remarks

section of the non-DOT form with the needed information. We do not object to this form of correction in the situation where the form was used out of necessity (*e.g.,* only form available for a post-accident test), though we do not think it is necessary to include this point in the rule text. It would obviously be contradictory to use this approach where the non-DOT form was allegedly used ''inadvertently,'' since a collector who noticed the use of the form sufficiently to make the annotation would clearly have been aware of what form he or she was using.

Section 40.207 What Is the Effect of a Cancelled Drug Test?

This section is based on § 40.205 of the NPRM. There was only one comment, which asked for guidance on what to do if an employee with a confirmed positive test had his or her test cancelled because of a fatal or uncorrected flaw. Other provisions of this part determine what action the employer is authorized or required to take. For example, following a cancellation of a verified positive test because a split specimen was unavailable for testing, there must be an immediate recollection under direct observation.

Section 40.209 What is the Effect of Procedural Problems That Are Not Sufficient to Cancel a Drug Test?

There were few comments on this section, which is based on § 40.207 of the NPRM. The NPRM version stated a general principle: tests cannot be cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. The point of this proposal was to prevent administrative or judicial decisions invalidating drug tests that were fair and correct, but had certain *de minimis* irregularities. One commenter objected to this principle, saying that tests should be cancelled in these situations. Other commenters were supportive.

Because of comments to other sections of the rule asking for clarification about whether certain mistakes in the process should be the basis for cancellation, and on the basis of the Department's experience in dealing with issues in many drug testing cases, we have decided to add to this section a list of matters that, consistent with this principle, never result in the cancellation of a test. This is not an exclusive or exhaustive list. These matters must be documented, and may result in corrective action for employers or service agents involved, but the proper remedy is not to cancel the test. This is a safety rule, and it is not consistent with safety to permit someone with a positive drug test to continue performing safety-sensitive functions because a collector made a minor paperwork error that does not compromise the fairness or accuracy of the test.

One of the points we make in this section is that a urine collection or an alcohol test must not be cancelled solely because the collector, BAT, or STT has not met training requirements. Such a test would be cancelled only if there were a fatal flaw or other circumstances requiring cancellation. However, an organization that had a pattern or practice of using untrained collectors, BATs, or STTs would be subject to DOT enforcement action (in the case of an employer) or a PIE (in the case of a C/TPA or other service agent).

Subpart J—Alcohol Testing Personnel

Generally speaking, there were far fewer comments on the alcohol testing portions of the rule than on the drug testing and other sections. Throughout much of the alcohol testing portion of the rule, one commenter provided extensive rewrites of the proposed regulatory text. These comments were clearly the product of substantial and thoughtful work on the commenter's part. For the most part, however, the suggested rewrites did not propose significant substantive changes in the proposed text. We will not discuss these rewrites on a paragraph-by-paragraph basis, except where they raise a substantive point that calls for a response.

Section 40.211 Who Conducts DOT Alcohol Tests?

The only comments on this section had to do with the limitation on supervisors serving as BATs or STTs for their own subordinates. Some commenters said that this restriction should be modified, since many supervisors had been trained as BATs and there were some situations, such as ships at sea, where supervisors might be the only BATs or STTs available. We note that the proposed regulation already permitted supervisors to serve as BATs and STTs if no one else were available and DOT agency alcohol testing regulations allowed this practice. As in the case of collectors in the drug testing program, we have used the term ''immediate'' supervisors to indicate that someone higher up in the chain of command was not limited by this restriction.

Section 40.213 What Training Requirements Must STTs and BATs Meet?

The Department has revised this training both in response to comments and to parallel, as much as feasible, the training requirements for collectors in the drug testing program. One comment we adopted in both places was to permit use of a variety of training media (*e.g.,* classroom instruction, internet, video, CD–ROM) for the academic portion of the training. For the proficiency demonstration part of the training, however, absent technological means of real-time monitoring and evaluation of actual proficiency demonstrations, in-person monitoring would be necessary. We also replaced the proposed ''sufficiently knowledgeable'' language referring to trainers, which commenters said was too vague, with a series of criteria relating to experience or course work in the testing field.

One commenter suggested a list of scenarios that should be randomly included in the three consecutive error-free collections needed to demonstrate proficiency for BATs. Without specifically endorsing the commenter's list, we believe that this is a useful suggestion. The Department's guidance on training will include a list of this type for use of persons conducting training.

As in the case of collectors in the drug testing program, BATs and STTs would have to undergo refresher every five years, and error correction training when needed. Most commenters on the subject favored these kinds of training, though some had reservations about what they viewed as the higher costs of the training. In this matter, we believe that insistence on high training standards is no vice, and moderation in the pursuit of a well-trained work force is no virtue. Such a work force is vital to the integrity of the program.

As in the drug testing collector training, some commenters favored waiting until more than one error resulting in cancellation of a test had occurred before requiring error correction training. As in that case, we believe that any such event creates an important training opportunity, to make sure that the individual does not make the same mistake in the future.

Section 40.215 What Information About the DER do Employers Have To Provide to BATs and STTs?

Proposed § 40.215 proposed various record retention and information requirements for organizations employing BATs and STTs. Because we believe it would relieve paperwork

burdens for employers and C/TPAs to have BATs and STTs maintain documentation of their training and qualifications (as § 40.213 provides), the only remaining portion of this section is proposed paragraph (c). This paragraph, on which there were no substantive comments, tells employers to provide to BATs and STTs the name and phone number of a DER.

Section 40.217 Where is Other Information on the Role of STTs and BATs Found in This Regulation?

This is another in the series of cross-reference sections, pointing readers to other sections of the rule relevant to the functions of BATs and STTs.

Subpart K—Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

Section 40.221 Where Does an Alcohol Test Take Place?

We adopted this provision without substantive change.

Section 40.223 What Steps Must be Taken To Protect the Security of Alcohol Testing Sites?

We adopted a comment to include ASDs in the requirement to secure testing devices when they are not being used. In response to another comment, we created an exception to the rule that BATs and STTs may not leave the testing site when a test is in progress. The exception is for a situation in which the BAT or STT must notify a supervisor or contact a DER for assistance in the case an employee or other person who obstructs, interferes with, or unnecessarily delays the testing process. Otherwise we have adopted the proposed section without substantive change.

Section 40.225 What Form Is Used for an Alcohol Test?

Most of the comments on this section focused on changes commenters sought in the ATF. The form has been revised, and we have included it at Appendix F. Its use will become mandatory on August 1, 2001. We have also modified the language concerning foreign-language versions of the form to be consistent with the parallel provision concerning the CCF.

Section 40.227 May Employers Use the ATF for non-DOT Tests, or non-DOT Forms for DOT Tests?

This section parallels the requirements for use of the CCF in the drug testing program. The few comments on the section were supportive of the Department's approach.

Section 40.229 What Devices Are Used To Conduct Alcohol Screening Tests?

We adopted one comment, including a clarifying note in § 40.231 that only EBTs listed in the NHTSA CPL *without* an asterisk can be used in the DOT alcohol testing program.

Section 40.231 What Devices Are Used To Conduct Alcohol Confirmation Tests?

We adopted one of several editorial comments we received on this section from a commenter, which is to remove the word ''sequential'' from the requirement that an EBT print a unique number on each copy of the result. As the commenter noted, the important thing is for the same unique test number to be displayed before the test and printed out on the result.

Section 40.233 What Are the Requirements for Proper Use and Care of EBTs?

A number of commenters said it was unclear in the proposed version of this section who was responsible for what. To address this problem, we place responsibility on the user of the EBT, who could be an employer or a service agent. We asked in the preamble to the NPRM whether we should retain the requirement for quality assurance plans (QAPs). Most commenters favored retaining this requirement, and we have done so. We are not specifying in the rule, however, who is authorized to perform various maintenance, calibration, etc., functions, as one commenter suggested. We are not in a good position to determine who can best perform these functions.

Section 40.235 What Are the Requirements for Proper Use and Care of ASDs?

Most of the comments on this section were editorial. One commenter expressed concern that the section appeared to focus on saliva ASDs to the exclusion of breath ASDs. This is not the case. These sections are derived from provisions of the existing regulation that apply to breath devices as well as saliva devices. Because the ''use and care'' requirements for EBTs of § 40.233 also apply to breath ASDs, we have added a cross reference to § 40.233 for clarity.

Subpart L—Alcohol Screening Tests

Section 40.241 What Are the First Steps in Any Alcohol Screening Test?

Many comments on this section were parallel to the comments on § 40.61. In response to the concern about tests not being scheduled in advance, we changed the language to refer to situations in which tests were scheduled. We also added language telling BATs and STTs to begin testing without ''undue'' delay. We did not adopt comments suggesting that it was appropriate for the testing process to wait upon the arrival of employer or employee representatives.

One commenter noted an inconsistency between the way the NPRM treated refusals to sign the certification on the drug and alcohol testing forms, respectively. In the drug testing case, the collector is directed to note the problem in the remarks section of the form and continue with the test. In the alcohol testing case, the BAT or STT is directed to treat the problem as a refusal to test. We agree that these provisions should be consistent, and we have changed the alcohol procedure to be like the drug procedure.

Section 40.243 What Is the Procedure for an Alcohol Screening Test Using an EBT or Non-Evidential Breath ASD?

Commenters had a variety of concerns about this section. One commenter asked if showing the employee the sequential number displayed on the device has been omitted from this provision. It has, and the omission was intended. We do not believe that this action is necessary to maintain the integrity of the process. In addition, these number displays are not available on all devices, such as some types of ASDs.

Another commenter had several suggestions for elaborating on instructions to the BAT or STT as part of the preliminary portion of the testing process. We will consider including these suggestions in guidance. Another commenter asked us to specify the number of times an employee could blow into a breath device. We do not think that this is necessary. The point is to complete the test successfully. If it becomes apparent that the employee cannot provide sufficient breath to activate the device, then we expect the BAT or STT to use good judgment in determining when to begin the ''shy lung'' procedure.

A commenter suggested allowing the result printout to be attached either to the front or the back of the ATF. We will adopt this comment in our pending revision of the ATF. Another suggestion was to use tamper-evident tapes that do not discolor over time. We think that this is a good idea, but not one that we need to mandate in rule text. We have adopted a commenter's suggestion that a self-adhesive label that is tamper-evident can be used to affix a result printout to the ATF.

Section 40.245 What Is the Procedure for an Alcohol Screening Test Using a Saliva ASD?

The Department is adopting the proposed section without substantive change. One commenter asked to include material pertaining to new evidentiary saliva devices. At the time of the publication of this rule, NHTSA is looking at such devices, but NHTSA's review is not complete. NHTSA is considering modifying its model specifications for evidential breath testers to accommodate technologies that measure alcohol in other bodily fluids, such as saliva. If adopted, such changes would also require technical adjustments to Part 40 so that both the NHTSA action and Part 40 requirements worked smoothly in concert. Subsequent to this revision of Part 40, any proposed modifications to NHTSA model specifications or Part 40 to accommodate the above advances in technology would be published in the **Federal Register**, so that the public may comment on them before any changes are made final.

Another commenter said that the ATF can get too sloppy when the STT attempts to use the same form for two separate devices. There is no mandate to use the same form. If one form is getting too cluttered, the STT can use a new form for the part of the process involving the second device. This commenter also said that, in the event the device does not activate on the first try, the STT should not have to place the device in the employee's mouth for the second attempt. We believe that maintaining this requirement is useful to ensure that the second attempt is more likely to succeed (*e.g.,* in a situation in which the employee has used the device incorrectly at first). This commenter also suggested that there may be situations in which it is not possible to conduct a new test on an EBT, when the STT could not successfully follow ASD procedures. We agree with the commenter that the regulation should include language to address this situation, and we have added a provision to § 40.271(a)(3) for this purpose.

Section 40.247 What Procedures Does the BAT or STT Follow After a Screening Test Result?

This section is also substantively unchanged from the NPRM. One commenter preferred splitting the section into several sections, believing that this would make the requirements more clear. Paragraphs (a), (b), and (c) each are devoted to a single situation (test result of less than 0.02, result of 0.02 or greater, invalid result). We believe this organization is sufficiently clear. This commenter also suggested that we clarify that the employee must be observed during the waiting period in all circumstances. We agree, and we have added language to this effect to § 40.251(a)(1). The purpose of this observation is to ensure that the employee remains under the control of responsible personnel during the waiting period and does not take any actions that could interfere with the successful completion of the testing process.

Several comments asked that BATs be able to transmit test results to employers via C/TPAs, acting as intermediaries. Consistent with the Department's decisions in the drug testing part of the rule, the final rule will permit transmission of negative results by this means. (We will not permit positive results to be sent in this way. For safety's sake it is essential that these results be transmitted immediately and directly since, unlike drug test results, positive alcohol test results involve impairment.) Another commenter suggested that the ATF include a provision for a statement or check box to indicate that the employee had received instruction about the waiting period between the screening and confirmation tests. We will consider doing so as part of our pending revision of the ATF.

Subpart M—Alcohol Confirmation Tests

Section 40.251 What Are the First Steps in Any Alcohol Confirmation Test?

One commenter suggested editorial changes to clarify the timing of the waiting period and the confirmation test, in paragraph (a)(1). We have adopted this language. We have not adopted other editorial suggestions for this section, because we believe they are not necessary to clarify the proposed language. We disagree with a comment suggesting that conducting a confirmation test more than 30 minutes after the screening test should not be permitted. While, as paragraph (a)(1) states, it is desirable that the confirmation test begin within 30 minutes, we realize that circumstances (*e.g.,* transportation from the screening test site to a different confirmation test site) could delay the test past this point. Better a delayed test than none at all.

Section 40.253 What Are the Procedures for Conducting an Alcohol Confirmation Test?

At a commenter's suggesting, we added the word ''conducting'' to the first line of this section. Consistent with § 40.243, we have added language saying that a self-adhesive label that is tamper-evident can be used to affix a result printout to the ATF. The section is otherwise unchanged from the NPRM version. We do not believe extensive editorial changes are needed. One commenter said that all test results of 0.02 or greater made on a defective machine before corrective action is taken must be cancelled. This point is covered by § 40.267(c)(5). We will leave the word ''sequential'' in paragraph (f). This section involves the use of EBTs, all of which have sequential test number displays.

Section 40.255 What Happens Next After the Alcohol Confirmation Test Result?

Aside from a few editorial changes and additional requests that C/TPAs be able to act as intermediaries in the transmission of results, there were no comments on this sections. We have addressed the C/TPA transmission issue elsewhere. We have adopted the proposed section without change.

Subpart N—Problems in Alcohol Testing

Section 40.261 What Is a Refusal To Take an Alcohol Test, and What Are Its Consequences?

In response to a comment, we added language clarifying that the failure to remain at a testing site until the testing process was complete constitutes a refusal to test. We have deleted the provision treating refusal of the employee to sign the ATF certification in Step 4 as a refusal to test. Otherwise, the section is substantively unchanged from the NPRM. We have not made extensive editorial changes.

Section 40.263 What Happens When an Employee Does Not Provide a Sufficient Amount of Saliva for an Alcohol Screening Test?

There was no substantive comment on this section, and we have adopted it unchanged from the NPRM.

Section 40.265 What Happens When an Employee Does Not Provide a Sufficient Amount of Breath for an Alcohol Test?

We have revised this provision to be parallel, in many respects, with the ''shy bladder'' procedure in the drug testing portion of the rule. These changes

include providing that the evaluating physician must have expertise in the issues raised by the employee's failure to provide a sufficient amount of breath and that the employee must obtain the evaluation within five days. (The physician could be a specialist, but need not be. What is important is that the physician have sufficient expertise to deal effectively with the issues presented in the employee's case.) Three commenters suggested that this time period should be changed to one, three, or seven days rather than five days. We believe that the five-day period should be generally sufficient and is consistent with other medical evaluation provisions of the rule.

However, the Department is aware that, in some cases, it may be difficult for an employee to secure, on his or her own, an appointment for this evaluation in a short period of time. Consequently, the Department does not regard it as a refusal to test if the employee is unable, after making good faith efforts, to get the appointment within the 5-day period. However, the employer should do everything feasible to assist the employee in finding and getting an appointment with an appropriate physician.

A commenter suggested giving employees additional attempts to provide a sufficient amount of breath to complete a test. We have modified this section to permit an additional attempt, if the BAT or STT believes that it would be useful (*e.g.,* because the employee came close on the second attempt or made a mistake in using the device that could be readily corrected). It is not mandatory for the BAT or STT to provide this third attempt. At this commenter's suggestion, we have also added language telling the BAT or STT to instruct the employee on the proper use of the device.

Section 40.267 What Problems Always Cause an Alcohol Test To Be Cancelled?

One commenter disliked the use of the word ''cancelled,'' preferring ''invalid.'' The term ''invalid'' has a specific meaning in the drug testing part of the rule, so we think it better to avoid the word here. ''Cancelled'' has the same meaning here as it does in drug testing, and should not cause any confusion. A commenter suggested adding rule text requiring BATs and STTs to notify DERs within 48 hours of the discovery of a fatal flaw. We agree that prompt notification is important, and we have added language to § 40.273 to this effect. We put this provision into § 40.273 so that it applies to all cancellations.

Section 40.269 What Problems Cause an Alcohol Test To Be Cancelled Unless They Are Corrected?

There were no substantive comments on this section, which is unchanged from the NPRM.

Section 40.271 How Are Alcohol Testing Problems Corrected?

As discussed above, we have added a new paragraph (a)(3) to this section, concerning situations in which a new testing device is not available at the testing site. We have also added a new paragraph (c), clarifying that when a correctable flaw cannot be corrected, the test must be cancelled. We did not receive substantive comments on this section, which is otherwise unchanged from the NPRM.

Section 40.273 What Is the Effect of a Cancelled Alcohol Test?

There were no substantive comments on this section, the proposed text of which is unchanged from the NPRM. We have added new paragraphs (c) and (d), which respectively call for notification of the DER and state that a cancelled test is not intended to provide a basis for a subsequent test under company policy,

Section 40.275 What Is the Effect of Procedural Problems That Are Not Sufficient To Cancel an Alcohol Test?

Section 40.277 Are Alcohol Tests Other Than Saliva or Breath for Screening and Breath for Confirmation Permitted Under These Regulations?

There were no substantive comments on these sections, which are unchanged from the NPRM.

Subpart O—Substance Abuse Professionals and the Return-to-Duty Process

Section 40.281 Who Is Qualified To Act as a SAP?

Section 40.283 How Does a Certification Organization Obtain Recognition for Its Members as SAPs?

These sections were both based on proposed § 40.281. We received extensive comment on the question of who should be viewed as eligible to perform SAP functions. Many individuals, professional organizations, and certification organizations (*e.g.,* for drug and alcohol counselors, marriage and family therapists, licensed professional counselors) asserted that their qualifications were as appropriate, if not more so, than groups and professions which the rule views as eligible. Without denigrating the qualifications of any individuals, professions, and organizations, the Department believes that the proposed rule continues to identify those professions and organizations that currently are best equipped to perform the SAP function in the DOT drug and alcohol testing program.

This is a program that is national in scope, and we believe that, for persons who wish to act as SAPs based on membership in a licensed or certified profession, it is reasonable to require that the licensure or certification be available in all U.S. states. For persons who wish to act as SAPs based on an organizational certification, the Department has set forth criteria in Appendix E for the requirements that must lie behind such certifications. The Department developed these criteria under the existing rule as a means of evaluating applications to the Department for SAP eligibility, and they are consistent with the requirements of certification organizations that are already part of the SAP program.

The NPRM proposed to require organizations that certify counselors to obtain National Commission for Certifying Agencies (NCCA) accreditation before submitting their requests to have the Department consider their certified counselors for inclusion in the SAP definition. The NPRM also proposed that the two certifying organizations whose counselors are already in the SAP definition (*i.e.,* the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC) and the International Certification Reciprocity Consortium/ Alcohol and Other Drug Abuse (ICRC)) would not be required to have NCCA accreditation because they have already been through a rigorous Department process prior to their inclusion.

Commenters overwhelmingly supported the concept of having certification organizations obtain NCCA accreditation prior to submitting their requests to have their certified counselors considered for inclusion to the Department. A few organizations opposed any type of review by any organization, including the Department, prior to having their certified counselors added to the SAP definition. A few commenters wanted the Department to maintain total control of the review process—a process that proved entirely too burdensome and time consuming for us. Still other commenters wanted us to clarify that the NCCA accreditation requirement (and Appendix F of Part 40) applied solely to certifying organizations wishing to have their counselors included in the SAP definition and not to physicians, social

workers, psychologists, and employee assistance professionals; and not to NAADAC and ICRC. Those who commented on NAADAC and ICRC, did not believe NCCA accreditation was necessary for those two groups.

Part 40 will require certification organizations wishing to have their certified counselors included in the SAP definition to meet the requirements (which includes NCCA accreditation) at Appendix F of Part 40 prior to asking the Department to review their inclusion proposals. The Department will still receive and review all proposals for inclusion based upon Appendix F standards. It is important to note that NCCA accreditation is simply one of the prerequisites for inclusion, but it represents an area of review that the Department found to be the largest barrier to our streamlining the process for reviewing certification groups' application materials and for evaluating the quality of those groups' certification testing processes.

Because NAADAC and ICRC excelled in the Department's previous review process, they will be compelled neither to have NCCA accreditation nor to complete the process again. Physicians, social workers, psychologists, and employee assistance professionals were never intended to have NCCA accreditation. This requirement is not for them: it is only for certification organizations wishing to have their certified counselors added to those of NAADAC and ICRC.

A few commenters suggested that all SAPs be certified by the Department. One suggested that we support any future proposals by the Substance Abuse and Mental Health Services Administration to certify drug and alcohol counselors. While we support efforts to ensure that SAPs are better trained (and Part 40 has new training requirements for SAPs), the Department lacks the expertise, personnel, and time needed to establish and operate a SAP counselor certification effort. Like the lone commenter mentioned in this paragraph, we would support efforts by HHS to develop certification standards and subsequently certify all drug and alcohol counselors.

As was the case with commenters on MRO training, most commenters on SAP training thought that self-certification was not adequate. Many comments favored more formal training requirements for SAPs, like those proposed for MROs. Some of these comments mentioned situations in which they believed SAPs had made poor decisions based on an incomplete understanding of their role under the DOT rules.

The Department is persuaded that more formal SAP training is appropriate. Like MROs, SAPs are highly-qualified professionals. They play a key role in the return-to-duty process, which has important safety implications. In addition to their professional qualifications, they need to be very aware of their role in implementing DOT agency drug and alcohol testing rules. Consequently, the Department is revising SAP training requirements to parallel the training requirements for MROs. The Department is aware that there are not currently an array of SAP courses analogous to the MRO courses that medical groups currently present. For this reason, the SAP qualification training deadline has been extended to December 2003. However, the Department anticipates that, in the time permitted for new and current SAPs to meet this requirement (see § 40.281(c)(3)), the demand for training will lead to a supply becoming available. We believe that organizations will take the opportunity to create appropriate training courses and materials.

Like qualification training for MROs, SAP qualification training includes a requirement for an examination. However, the Department does not believe that this examination need be a formally designed and validated examination. SAP functions are narrower in scope and less complex than MRO functions, and the examination can therefore be simpler, in our view. The purpose of SAP training and the examination is not to teach people how to be clinicians, but rather to help SAPs learn how to operate in their specialized role within the DOT regulatory framework.

As with MROs, we have added a continuing education requirement to keep SAPs current on program requirements and issues. This continuing education must involve a test or other assessment tool to help SAPs determine whether they have successfully learned the material.

Section 40.285 When Is a SAP Evaluation Required?

This section is based on § 40.283 of the NPRM. Consistent with other provisions of the rule, we have added adulteration and substitution results to the situations requiring SAP evaluations. We disagree with a commenter who said that an alcohol test result of 0.04 or greater was not a violation of DOT agency alcohol regulations. It is a violation, and a SAP evaluation is a necessary part of the return-to-duty process following such a violation. Some comments questioned whether a SAP evaluation was necessary in all cases (*e.g.,* including pre-employment tests) following a violation. It is, and we have added some clarifying language to this effect. In the case of a pre-employment test violation, the employer to whom the individual had applied would be responsible for providing the individual information about SAP resources and the return-to-duty process, even if the employer wanted no further relationship with the individual.

A commenter asked whether a SAP evaluation would be needed for an employee who had a DUI/DWI charge against him or her in a private automobile. The answer is no: under Part 40 only a violation of DOT agency drug and alcohol testing rules triggers the requirement for a SAP evaluation (though DOT agency rules may impose additional requirements in some cases). Another commenter recommended that applicants who test positive on pre-employment tests should be required to present evidence of having completed the return-to-duty process before being able to work in a safety-sensitive position for another employer. We have addressed this issue in § 40.25, concerning inquiries about previous test results.

Section 40.287 What Information Is an Employer Required To Provide Concerning SAP Services to an Employee Who Has a DOT Drug and Alcohol Regulation Violation?

This section is based on proposed § 40.285 of the NPRM. There were few comments. One asked whether the employer or the employee was to select the SAP. This section does not address selection of a SAP: it just says that the employer has to provide the employee a list of SAPs and how to reach them. The provision does clarify that this requirement applies to all violation situations, including pre-employment tests. If an applicant fails a pre-employment test, the employer must provide this information even if the employer intends not to hire the applicant.

Section 40.289 Are Employers Required To Provide SAP and Treatment Services to Employees?

This provision is based on proposed § 40.287 of the NPRM. Paragraphs (a) and (c) emphasize the employer's provision of SAP services. An employer may or may not provide SAP-related services to employees. An employer may or may not pay for such services. These are matters the Department leaves to employer discretion or labor-

management negotiations. One commenter suggested that employers be required to cover these services in their health plans. We believe that, as the commenter acknowledged, imposing coverage requirements on health care providers or insurers is outside the Department's jurisdiction.

The proposed § 40.287 included two paragraphs telling employers that they must ensure the SAPs used to evaluate employees before they return to duty meet certain qualifications. In view of the SAP training and qualification provisions of § 40.281 of the final rule, we believe these paragraphs are duplicative, and we have deleted them. This section continues to emphasize that, before an employee who has violated a DOT agency drug and alcohol testing regulation may return to safety-sensitive duties, the employee must successfully complete the SAP evaluation/return-to-duty process.

Section 40.291 What Is the Role of the SAP in the Evaluation, Referral, and Treatment Process of an Employee Who Has Violated DOT Agency Drug and Alcohol Testing Regulations?

The content of proposed § 40.291 has been moved to § 40.355(a). This section now concerns a different subject, stating the general duties of SAPs.

Section 40.293 What is the SAP's Function in Conducting the Initial Evaluation of an Employee?

The final rule has no equivalent to proposed § 40.289, the content of which duplicates other provisions in this subpart. There were few comments concerning § 40.293, and they were mostly supportive. Some comments did favor allowing C/TPAs to transmit SAP reports to employers. As discussed in the ''Principal Policy Issues'' section of the preamble, we have chosen not to permit this, as a means of preventing anyone from having the opportunity to alter the SAP's report and recommendations.

We have added three new points to this section. First, as discussed in the ''Principal Policy Issues'' section of the preamble, we believe that there are no circumstances in which it is appropriate for a SAP to find that a violator of our regulations is not in need of education and/or treatment. Therefore, paragraph (b) requires that SAPs make a recommendation for education and/or treatment in every case. Second, we have become concerned that we have not previously given SAPs guidance with respect to employees' stories that minimize the seriousness of their violations, analogous to the guidance we give MROs with respect to legitimate medical explanations. Therefore, paragraph (f) specifically forbids SAPs from taking certain kinds of factors into account in making their recommendations.

Third, while we are not making quantitations routinely available to SAPs in drug testing cases (see discussion in ''Principal Policy Issues''), we believe it is very important for MROs and SAPs to have good communications about employees. Paragraph (g) explicitly authorizes SAPs to consult with MROs, and tells MROs they must cooperate with SAPs in these consultations.

Section 40.295 Can Employees or Employers Seek a Second SAP Evaluation if They Disagree With the First SAP's Recommendations?

The purpose of this section is to prevent employers and employees from forum shopping until they get a SAP evaluation they like. Most comments supported the proposed prohibition on second opinions, though one commenter thought this should be permitted if the original SAP does a bad job. The difficulty with this suggestion is that a party's perception of the quality of the SAP's work is likely to be influenced on whether the SAP made a recommendation the party feels is in its interest. We believe that a prohibition on second opinions is the only way to prevent forum shopping.

One commenter suggested that we remove the reference to the SAP being suitable to the employer. We believe the proposed language in this section is unnecessary, and we have deleted it. Also, to tighten the provision, we have added a sentence saying that if, notwithstanding the regulatory prohibition, an employee gets an evaluation from a second SAP, the employer must not pay any attention to it.

Section 40.297 Does Anyone Have the Authority To Change a SAP's Initial Evaluation?

Several commenters noted that the language of the proposed section appeared to prevent even the SAP who originally made the recommendation from modifying his or her own recommendation. We did not intend to prevent SAPs from modifying their own recommendations, and we have added clarifying language that permits SAPs to do so when they receive new or additional information.

Section 40.299 What Is the SAP's Role and What Are the Limits on a SAP's Discretion in Referring Employees for Treatment and Education?

A number of commenters appeared to prefer stating one of the exceptions to the rule against self-referral in terms of SAPs located in ''rural and remote areas'' rather than the NPRM's ''general commuting area'' language. The Department does not believe that this would improve the clarity of the section, since ''rural'' and ''remote'' are rather subjective terms. The exception is intended to apply, in any case, to a situation in which there is no other source of services reasonably available in the vicinity. For example, if an employee had to make an overnight trip to get to another source of services, we would not consider it reasonably available.

One commenter wanted to consider referrals to spouses as prohibited by this section. We believe this is covered by the prohibition on referrals to people with whom the SAP shares a financial interest. Another commenter wanted to create a fifth exception for in-house corporate SAPs. We believe that the second and third exceptions are adequate to cover this situation. We also received a suggestion to delete the signed statement requirement of proposed paragraph (d). Given the specificity of the other requirements of the section, we do not believe that this signed statement adds much of substance, and we have deleted it in the interest of reducing paperwork.

Section 40.301 What Is the SAP's Function in the Follow-Up Evaluation of an Employee?

Comments were generally supportive of this section. A few comments pointed out that some current DOT agency regulations do not make use of the SAP process. This is true. However, DOT agencies will amend their regulations to conform to Part 40 before the effective date of this part. Another commenter asked for clarification of who makes a return-to-duty determination. SAPs simply determine whether an employee has successfully demonstrated compliance with the SAP's recommendations. As this section and § 40.305 make clear, only the employer decides whether, after all prerequisites have been met, the employee returns to safety-sensitive duties. In response to comments that employers should be notified if the SAP process is taking longer than expected (*e.g.,* because the employee has not made expected progress in treatment), we have added a provision requiring the SAP to provide

written notice to the employer when the employee has not demonstrated successful compliance on follow-up evaluation.

The Department understands that not every employee will make strides in dealing with a drug or alcohol problem sufficient to receiving a SAP follow-up report indicating that he or she has demonstrated successful compliance with the SAP's recommendation. When this happens, we believe that it is important that the employer receive a SAP follow-up report outlining the reason(s) why the employee has not demonstrated successful compliance. We understand that some employees may be actively involved in carrying out their education and/or treatment plan and simply need additional time to complete the work. Others may have been non-participants in a SAP-recommended program. Therefore, when the SAP determines that the employee has failed to demonstrate successful compliance, we have no objection to having the employer deciding to allow an additional SAP follow-up evaluation to be made consistent with the employee's progress (or lack of progress) and with employer policy and/or labor-management agreements. Nor will the Department object if the employer chooses instead to take other personnel actions consistent with employer policy and/or labor-management agreements.

Section 40.303 What Happens if the SAP Believes the Employee Needs Additional Treatment, Aftercare, or Support Group Services Even After the Employee Returns to Safety-Sensitive Duties?

As discussed in the ''Principal Policy Issues'' section of the preamble, we have deleted a proposed requirement that employers ''monitor'' returned employees'' aftercare. This was the subject of the bulk of the comments on this section. The section now gives discretion to employers concerning their monitoring and enforcement of SAP aftercare recommendations. We strongly recommend that employers play an active role in ensuring that employees who have returned to work following a violation comply with aftercare recommendations. This is very important both for safety and the welfare of the employees. The rule also states that employees are obligated to comply with these SAP recommendations and are subject to employer discipline if they do not.

Section 40.305 How Does the Return-to-Duty Process Conclude?

This section underlines the point that it is the employer, and the employer alone, who is responsible for deciding whether an employee who has violated DOT agency drug and alcohol testing rules will return to work. A determination by the SAP that the employee has successfully complied with the SAP's recommendations is a prerequisite to the employee's return to duty. So is a negative result on a subsequent return-to-duty test. But only the employer can decide whether or not to put the person back to work. SAPs do not make ''fitness for duty'' decisions, and employers should not ask them to do so. Commenters asked that we make these points clear. We think this section is as clear on this point as we can make it.

Section 40.307 What Is the SAP's Function in Prescribing the Employee's Follow-up Tests?

Section 40.309 What Are the Employer's Responsibilities With Respect to the SAP's Directions for Follow-up Tests?

As discussed in the ''Principal Policy Issues'' section of the preamble, the Department has decided to retain the ''at least six follow-up tests in the first 12 months'' formulation for follow-up testing. In response to requests from commenters, we have clarified that this follow-up testing requirement ''follows the employee'' through job changes and breaks in safety-sensitive service. The six tests must occur during the first 12 months of safety-sensitive service after return-to-duty, regardless of for whom or when that service is performed.

Of course, SAPs have the discretion to require more follow-up tests than the minimum. One commenter suggested that SAPs negotiate the number of follow-up tests over the minimum with the employer. We did not adopt this suggestion, because this is intended to be a clinical determination, not subject to economic or policy give-and-take. Employers are obligated to follow the SAP's follow-up testing plan. All parties involved should be aware that, under this rule, all employees who return to work after a violation will have a follow-up testing requirement with which employers and employees must comply.

Section 40.311 What Are Requirements Concerning SAP Reports?

Most of the comment on this section concerned the issue of C/TPAs acting as intermediaries in the transmission of SAP reports to employers. As discussed above, the Department is not permitting C/TPAs to act in this capacity. SAPs must send their reports directly to the DER. The report must be on the SAP's own letterhead, not that of a C/TPA or another service agent.

In response to a comment on the content of the SAP report, we have used the term ''date(s)'' rather than ''date'' to cover the possibility that assessments will happen over a period of time longer than a single meeting. We have also clarified that ''reason for the assessment'' refers to the date and nature of the violation of DOT rules, as a commenter requested, and as DOT's SAP Guidelines outline.

Section 40.313 Where Is Other Information on SAP Functions Found in This Regulation?

This is the last of the regulation's sections providing informational cross-references to other provisions concerning, in this case, SAP functions.

Subpart P—Confidentiality and Release of Information

Section 40.321 What Is the General Confidentiality Rule for Drug and Alcohol Test Information?

Several commenters disagreed with the proposal to continue the Department's ban on blanket releases. These commenters believed that permitting blanket releases would facilitate the flow of information among parties who needed to know, for example, whether an applicant for a job had previously violated a DOT regulation. Other commenters favored retaining this proposal in order to protect employee privacy. The Department believes that the principle of specific written consent for any release of test result or medical information to third parties is critical to protect employees' legitimate expectations of privacy and confidentiality in the testing program. Permitting blanket releases is directly contrary to this principle. The Department will include the proposed provision in the final rule.

Section 40.323 May Program Participants Release Drug or Alcohol Test Information in Connection With Legal Proceedings?

The existing rule and the NPRM both provide that in a proceeding brought by, or on behalf of, an employee, resulting from a positive test (*e.g.,* a lawsuit or grievance), the employer may release employee test result information without the employee's consent. One commenter suggested that we add references to substituted and

adulterated tests and other refusals to test. We have done so.

Another commenter raised the issue of a different kind of legal proceeding. The commenter asked whether otherwise confidential information could be released in a personal injury lawsuit where the employee's conduct was an issue (*e.g.,* a truck or bus driver involved in a collision). We believe that, if a court orders the production of such information because it is relevant in such a proceeding, it is reasonable for the employer to provide it without getting the employee's consent. In this situation, the requirements of justice in the litigation outweigh the employee's privacy interest. We have added a paragraph to this effect. We also added a paragraph telling a service agent who is holding this information to provide it to the employer when the employer requests it for use in a legal proceeding covered by this section.

Section 40.327 When Must the MRO Report Medical Information Gathered in the Verification Process?

This section provides that, under certain circumstances, MROs must provide certain otherwise confidential information to employers and certain other parties. The purpose of providing this information is to enhance safety. Commenters had a variety of concerns about this section. One comment suggested that the medical information be provided in writing in all cases. We think that a prudent MRO may choose to do so, but we do not believe that a regulatory requirement is needed.

Some commenters objected to the paragraph that allows MROs to consult with the employee's own physician to see if alternate medication might be available that would be less likely to adversely affect safety, saying that MROs should stay out of what looks like a doctor-patient relationship with employees. A few commenters supported this proposal. Under the proposal, the MRO would take this step only with the employee's consent, and for the purpose of helping the employee find medication that would be compatible with safe job performance. From both the point of view of employee interests and safety, we believe that this proposal is sound, and we have retained it.

One commenter said that Canadian law would preclude a doctor from releasing this information to an employer. We have added a provision saying that if the law of a foreign country, such as Canada, prohibits MROs from providing medical information to the employer, the MROs may comply with that prohibition.

Another commenter pointed out that not only physicians, but also other medical professionals, may make determinations about whether an employee meets physical qualification standards. We have adopted the commenter's suggestion that the MRO can release information to the ''health care provider'' involved in this activity. Consistent with the SAP provisions of the rule, we have included SAPs who are evaluating employees as part of the return-to-duty process as a party to whom the MRO can provide information under this section.

Finally, as some commenters requested, we have made it mandatory for MROs to release information under this section if the information is likely to result in the employee being medically unqualified for performance of safety-sensitive duties under a DOT regulation or if the information indicates that continued performance by the employee of his or her safety-sensitive function is likely to pose a significant safety risk. In this case, the Department believes that the safety interest served by the information release outweighs the confidentiality interest of the employee.

We point out that the medical information described in this section cannot be transmitted to employers or other parties using a C/TPA or other service agent as an intermediary. MROs must transmit this information directly to the employer.

Section 40.329 What Information Must Laboratories and Other Service Agents Release to Employees?

Proposed § 40.329, concerning release of information by MROs to third-party employers, has been deleted, for the reasons given in the ''Principal Policy Issues'' section of the preamble. This section is based on proposed § 40.331 of the NPRM.

One commenter requested that the Department require that laboratories provide all records requested by an employee, as well as a laboratory person to testify in a legal proceeding who has firsthand knowledge of the laboratory, its records, and operating procedures. This commenter also requested that the rule require the laboratory to make records available within 10 days, rather than waiting for payment from the employee. This section does require that laboratories and other service agents provide a ''data package'' (sometimes referred to as a ''litigation package'') upon the employee's request. We do require that they provide it within 10 business days. The rule also limits the charge the service agent can make for the cost of copying and preparation. We believe these provisions adequately protect employee interests. We do not believe it is necessary, as another commenter suggested, to list the contents of a litigation package, which is quite standard and well understood among laboratories.

We have not adopted the suggestion that laboratories be required to produce witnesses for appearances at legal proceedings. Such an open-ended requirement would impose, in our view, unnecessary costs and burdens on laboratories and other service agents. There are adequate means (*e.g.,* documentary evidence) through which employees can raise issues about the testing process.

The NPRM proposed that laboratories provide to employees, on written request, information relating to the results of relevant HHS certification reviews. One comment supported this proposal, which is consistent with long-standing DOT interpretation of the existing Part 40, while another commenter proposed that the laboratory's obligation be limited to the latest HHS **Federal Register** notice listing the laboratory as certified. Based on conversations with HHS staff, we have decided to delete this provision. HHS staff believe that providing this information would unnecessarily intrude on the HHS-laboratory relationship and could result in the introduction of misleading information about the laboratory certification process in legal proceedings involving drug test results.

Section 40.331 To What Additional Parties Must Employers and Service Agents Release Information?

This section is based on § 40.333 of the NPRM. Some commenters objected to being required to permit DOT representatives to see a broad array of drug and alcohol testing information. DOT has significant safety responsibilities for transportation industries, of which our drug and alcohol testing rules are an important part. As part of its safety mandate, DOT must be able to inspect regulated employers and those who carry out their drug and alcohol testing program responsibilities. DOT cannot do this job unless we have access to all relevant information. We believe it is vital to maintain this provision in the final rule. We would point out, particularly in response to a comment that Canadian MROs could not legally release certain information, that this paragraph focuses on the inspection and review of documents as part of the DOT oversight process, not on release of information to third parties.

Commenters pointed out that, in some jurisdictions, state laws or rules require employers or service agents to provide drug test result information to state law enforcement or safety agencies. To ensure that there is no conflict between Part 40 and these state laws or rules, we have added language (already found in some DOT agency rules) to this section. It says that if requested by a state or local safety agency with regulatory authority over the employer or employee, employers and service agents must provide drug and alcohol test records concerning the employee to the agency. This paragraph also covers Federal agency requests (including requests by DOT, HHS, and the National Transportation Safety Board) for drug and alcohol test records. It should be noted that this paragraph applies only to testing records. It does not authorize provision of specimens.

We have also added a paragraph stating in rule text the advice we have frequently given to employers and service agents faced with subpoenas or other orders directing them, contrary to Part 40 requirements, to produce specimens where Part 40 does not permit. What is a laboratory or other party to do if it gets a request to produce a urine specimen or aliquot for an unauthorized test? The first thing the laboratory should do is to ''just say no,'' giving this DOT regulatory mandate as the reason. If someone seeks a subpoena or other court order directing the production of the specimen, the laboratory's attorneys should seek to quash or resist the action, asserting on the basis of this section that such an order is contrary to Federal law and subject to Federal pre-emption (under the existing pre-emption provisions of DOT agency drug and alcohol regulations). In such cases, we suggest that laboratories call the Department to consult about the matter. If a court ultimately issues a binding order requiring the production of the specimen, the laboratory may comply (we do not seek to make laboratories subject to contempt citations). However, as noted above, employers must continue to implement all consequences of a verified positive test required by DOT rules, regardless of the outcome of the unauthorized test or any personnel process decisions flowing from it.

Section 40.333 What Records Must Employers Keep?

This section is based on § 40.335 of the NPRM. In response to a number of comments and consistent with decisions reflected elsewhere in this document, proposed requirements for the retention of records concerning training of service agents and signed agreements with service agents have been deleted. Under the final rule, collectors, BATs, MROs etc. will maintain their own training records, and employers will not have this responsibility. The requirement to have signed agreements among employers and all service agents has been deleted.

In response to a comment, we have deleted the word ''secure'' from paragraph (c), since we agree that control of access is the key point. One comment suggested that service agents should have up to five business days to get information to employers who are being audited. In our view, each DOT agency's rules and inspection practices should determine how quickly an employer must produce records. The service agent is responsible for meeting the employer's need to comply with DOT agency requirements.

Subpart Q—Roles and Responsibilities of Service Agents

Section 40.341 Must Service Agents Comply With DOT Drug and Alcohol Testing Requirements?

There was only one comment on the proposed § 40.341. AC/TPA wanted C/TPAs to be authorized to act as a DER and to be required to have a certified MRO or administrator in charge. For reasons we have discussed elsewhere, we are not permitting C/TPAs to act as DERs. While we think that training and certification programs for program administrators are a good idea, we do not believe that it is necessary to make them mandatory at this point.

Section 40.343 What Tasks May a Service Agent Perform for An Employer?

This is a new section that makes the basic point that service agents can perform for employers those functions authorized by DOT rules. Proposed § 40.343 dealt with a different issue. DOT has become aware of reports that, particularly in some industries, service agents have imposed requirements on covered entities that exceed the requirements of DOT rules. Some service agents have made compliance with these extra requirements a condition of approval of an employer's DOT drug and alcohol testing program. The proposed section was intended specifically to prevent excesses of this kind.

There were few comments on the proposed section. One said that service agents work for employers in capacities other than compliance with DOT rules. This is doubtless true, but is an issue outside the scope of this rulemaking. One commenter suggested that there was a reverse problem, in that sometimes employers asked service agents (*e.g.*, SAPs) to perform tasks beyond what DOT rules require (*e.g.*, make fitness for duty decisions). We have strengthened language elsewhere in Part 40 to emphasize that it is inappropriate to call on SAPs to make these decisions for employers. A third commenter was concerned that the section might inhibit the ability of service agents to advise employers to recommend provisions not covered by DOT rules. Service agents can recommend provisions not covered by DOT rules, but they cannot make adoption of these recommendations a condition of approving employers' plans for DOT compliance purposes.

The Department has relocated this provision to § 40.355(l).

Section 40.345 In What Circumstances May a C/TPA Act as an Intermediary in the Transmission of Drug and Alcohol Testing Information to Employers?

The proposed § 40.345 made the point that a service agent that did not comply with DOT regulations was subject to PIE proceedings. Comments to this proposal were along the lines of comments on the PIE proposal itself, to which we responded in the ''Principal Policy Issues'' section of the preamble. The substance of this proposed section has been incorporated in § 40.341 of the final rule.

The new § 40.345 incorporates the Department's decision, discussed at length under ''Principal Policy Issues,'' to permit employers to use C/TPAs for a variety of information transmission functions, such as passing drug and alcohol test results from MROs or BATs to employers. We emphasize four points. First, with respect to any and all of the functions that C/TPAs may perform, the employer has the choice of using a C/TPA as an intermediary or getting the information directly from the party (*e.g.*, the MRO) who generates the information. Second, we direct readers' attention to Appendix F. C/TPAs may act as intermediaries *only* with respect to the functions listed in Appendix F.

Third, when C/TPAs act as an intermediary, they must meet all requirements (*e.g.*, concerning confidentiality and timing) that would apply if the party generating the information (*e.g.*, an MRO or collector) sent the information directly to the employer. For example, if a C/TPA transmits the MRO's drug testing results to DERs, it must transmit each drug test result to the DER in compliance with the requirements for MROs set forth in § 40.167. Fourth, as noted in connection with § 40.15, employers remain fully

responsible for receiving all information and taking all actions required under Part 40 and other DOT agency rule.

Section 40.347 What Functions May C/TPAs Perform With Respect to Administering Testing?

One comment on this section suggested that it refer to C/TPAs specifically, rather than service agents generally, because the content of the section covered functions that C/TPAs perform and other service agents (*e.g.*, MROs, laboratories) either should not or typically do not perform. We agree with this comment, and we have changed the language of the section accordingly. Another commenter appeared to be confused about the provision telling service agents not to select employees randomly for testing from a ''follow-up'' pool. This point—which applies to employers as well as C/TPAs—is that follow-up tests are scheduled individually for employees who have returned to safety-sensitive duties after a violation, consistent with the SAP's plan. It is never appropriate to put returned employees into a pool and select them randomly for follow-up testing. Employees never get advance notice of the time of a follow-up test, but follow-up testing is in no way random. On the other hand, in addition to being subject to follow-up testing, returned employees must be in the regular random testing pool, and are subject to selection for random testing on the same basis as all other covered employees.

Section 40.349 What Records May a Service Agent Receive and Maintain?

Some commenters on this section were concerned that because the proposed rule used the general term ''service agent'' in this section, the section glossed over restrictions on the activities of MROs and laboratories. They suggested that, as in the case of § 40.347, we limit the section to C/TPAs. While we agree that C/TPAs perform many record management functions, it does not appear to us that the provisions of this section apply only to C/TPAs. However, in response to the commenters' concerns, we are prefacing this section with an ''except where otherwise specified in this part'' statement (we did the same in § 40.347). The import of this language is that, where MRO, laboratory, or other provisions of the rule impose requirements or restrictions beyond those of this section, those requirements or restrictions control.

Another comment suggested clarifying that DOT access to service agent records and facilities does not apply to records and facilities not involved in the DOT drug and alcohol testing program. This point seems clear on the face of the proposed and final provisions, so we will not restate the obvious. Another comment objected to requiring this access, and asked for a justification. This is equally obvious: in order to maintain proper oversight of an important safety program, the Department needs access to the records and facilities of those who actually perform program tasks.

Section 40.351 What Confidentiality Requirements Apply to Service Agents?

This section is also based on parts of proposed § 40.349. A number of comments pertained to proposed § 40.349(e), relating to handling of the CCF. There is no equivalent to this proposed paragraph in the final rule. A few comments also supported allowing ''blanket'' releases of information. As under the present rule, we believe that blanket releases compromise the confidentiality of employee-specific records and are subject to abuse. The final rule continues this prohibition.

§ 40.353 What Principles Govern the Interaction Between MROs and Other Service Agents?

This section is based on § 40.351 of the NPRM. Much of the comment concerned the discretion of C/TPAs, acting as an intermediary, to transmit laboratory results to MRO and MRO verification decisions to the employer. As discussed in ''Principal Policy Issues'' and in connection with § 40.345, the final rule permits the latter and prohibits the former.

Some commenters appeared to believe that the proposed section required MROs to exercise full-time, in-person, over-the-shoulder supervision of their staffs. This is not the case. As long as MROs really supervise their staff, this supervision need not always take place at the same site. We are aware that MRO operations may have more than one site and that an MRO cannot be everywhere at once. On the other hand, the rule is intended to prohibit C/TPA staff, working on their own or under C/TPA rather than MRO supervision, from performing MRO staff functions.

To reduce paperwork, we have deleted a proposed requirement for written agreements between MROs and other service agents.

§ 40.355 What Limitations Apply to the Activities of Service Agents?

Some commenters on this section favored allowing C/TPAs to act as DERs and to act as an intermediary in transmitting results from laboratories to MROs. Another commenter opposed any ''firewalls'' between C/TPAs and MROs. As we have explained above, the final rule does not permit C/TPAs to act as DERs or to transmit laboratory results to MROs. In our view, some firewalls between MROs and other participants in the testing process are essential to maintaining the necessary independence of MROs.

Another commenter said that employers, not SAPs, should make follow-up testing determinations. SAPs are used in the return-to-duty process because of their expertise in evaluating individuals with drug and alcohol problems. We believe that their expertise should be used to determine follow-up testing requirements. Employers may know their workers, of course, but they are not typically experts in drug and alcohol abuse evaluation and treatment.

One commenter suggested adding a sentence specifying that MROs could determine that an individual had refused a test, in the context of an adulteration or substitution finding. We agree, and we have added this language.

We have added a paragraph concerning a problem that the Department has occasionally encountered. It states that service agents must not intentionally delay the transmission of drug or alcohol testing-related documents because of a payment dispute or other reasons. Parties can work out disputes among themselves, but it is essential to the safety purposes of this program that drug and alcohol testing results and other information flow freely. As a safety matter, this information must not be held hostage to business disagreements.

Subpart R—Public Interest Exclusions

The Department discussed PIEs extensively in the ''Principal Policy Issues'' portion of the preamble. We will not repeat this discussion here, focusing instead on points in the individual sections of Subpart R that should be highlighted.

§ 40.361 What Is The Purpose of a Public Interest Exclusion (PIE)?

Section 40.363 On What Basis May the Department Issue a PIE?

Section 40.365 What Is the Department's Policy Concerning Starting a PIE Proceeding?

These sections emphasize that the basic purpose of PIEs is to protect the public from serious noncompliance on the part of service agents. PIEs are not an exclusive remedy: We can take other actions (*e.g.*, sanctions against employers, referral to the DOT Inspector

General) if circumstances warrant. The basic grounds for issuing a PIE are serious noncompliance with Part 40 or DOT agency drug and alcohol testing regulations and failure to cooperate with DOT oversight and enforcement efforts.

Section 40.365 includes a list illustrating the kinds of misconduct that we believe warrant initiating a PIE proceeding. We emphasize that this is not an exhaustive or exclusive list. We can and will initiate PIEs on the basis of other fact situations, if warranted. However, this list should give interested persons a good idea of the Department's policy concerning the level of seriousness that we intend to be the basis for PIE actions. The items on the list all concern such matters as safety, the outcomes of test results, privacy and confidentiality, due process and fairness for employees, the honesty and integrity of the testing program, and cooperation with or provision of information to DOT agency representatives. Many of the items are drawn from problems the Department has noted under the existing Part 40.

We note that the PIE provisions of the rule are not intended to have retroactive effect. That is, the Department would not initiate a PIE proceeding on the basis of conduct that occurred before the PIE provisions took effect.

Section 40.367 Who Initiates a PIE Proceeding?

Section 40.369 What Is the Discretion of an Initiating Official in Starting a PIE Proceeding?

Section 40.371 On What Information Does an Initiating Official Rely in Deciding Whether To Start a PIE Proceeding?

Section 40.411 What Is the Role of the DOT Inspector General's Office?

These sections concern the Department's decision about whether to begin a PIE proceeding. Only selected DOT officials are authorized to begin such a proceeding: DOT agency drug and alcohol program managers, an official of ODAPC other than the Director (who, as the decisionmaker, is precluded from any role in initiating or prosecuting a PIE proceeding), or the designee of these officials. We emphasize that individual inspectors and subordinate staff members, while they may provide information to initiating officials, are not themselves authorized to initiate PIE proceedings.

Initiating officials have broad discretion in deciding whether to start a PIE proceeding, though this discretion must be exercised with the policy expressed § 40.365 in mind. DOT is never required to start a PIE proceeding. An initiating official can take into account such factors as his or her judgment of the seriousness of the matter and the availability of resources to investigate and prosecute a matter adequately.

An initiating official can rely on credible information from any source in deciding whether to start a proceeding. As many commenters requested, the initiating official will make an informal contact with the service agent before sending a correction notice, in an attempt to determine if the service agent has any information that would help the initiating official make his or her decision to initiate a proceeding.

While the DOT inspector general (IG) is not an initiating official in the PIE process, the IG can investigate complaints concerning waste, fraud, and abuse in the drug and alcohol testing program. The initiating official can use information from IG investigations and audits as the basis to begin a PIE proceeding. The IG can also take action leading to criminal or civil action against a service agent or employer if the facts warrant.

Section 40.373 Before Starting a PIE Proceeding, Does the Initiating Official Give the Service Agent an Opportunity To Correct Problems?

Section 40.375 How Does the Initiating Official Start a PIE Proceeding?

These sections describe the first formal steps in any PIE proceeding. Before taking other action, the initiating official sends a correction notice, outlining the compliance problem and giving the service agent 60 days to correct it. If the service agent documents correction of the problem in this period, the official does not pursue a PIE proceeding. If not, the official sends a notice of proposed exclusion (NOPE) to the service agent, detailing the basis for the proposed exclusion and informing the service agent of the next procedural steps.

There may be some problems that cannot be corrected, or some misconduct so serious that subsequent corrective steps are insufficient to make up for the effects of noncompliance. For example, an MRO who has counterfeit medical credentials probably cannot correct this problem. A laboratory that has demonstrated a significant lack of business integrity by falsifying evidence or a pattern or practice of careless conduct resulting in the cancellation of numerous tests might have great difficulty demonstrating that it has made adequate changes to make up for the problems it caused. The Department is not limited, in deciding whether to initiate a PIE proceeding, to purely prospective considerations (*e.g.,* analogous to the ''imminent [future] harm'' standard HHS uses in deciding to take certification action against a laboratory). Nor is the Department required to accept, on face value, assurances from a service agent that it has learned its lesson and will comply in the future. The Department will make judgments of this kind on a case-by-case basis.

Section 40.377 Who Decides Whether To Issue a PIE?

This sections focuses on the role of the ODAPC Director as decisionmaker. Section 40.377 articulates the firewall between the Director and the initiating official, to ensure impartiality. The Director can delegate the decisionmaking role to another official (*e.g.,* in a case where the Director would be unavailable to decide the case or recused himself or herself because of a potential conflict of interest), who would then be subject to the same firewall requirements.

Section 40.379 How Do You Contest the Issuance of a PIE?

Section 40.381 What Information Do You Present to Contest the Proposed Issuance of a PIE?

Section 40.383 What Procedures Apply if You Contest the Issuance of a PIE?

Section 40.385 Who Bears the Burden of Proof in a PIE Proceeding?

These sections cover an important part of the administrative due process protections built into the PIE provisions of the rule. Within 30 days of getting a NOPE, a service agent must contact the Director and make arrangements to present information and arguments. If the service agent asks to meet with the Director, the Director will schedule a meeting. At this meeting, or in a written presentation, the service agent may provide any arguments or factual information it believes relevant to the proposed issuance of a PIE, its scope and duration. We emphasize that the opportunity to meet with the Director is not a ''hearing'' or ''trial,'' with formal rules of evidence. The Director will consider any relevant evidence and listen to any witnesses the initiating official or the service agent presents. Because the initiating official is the proponent of the PIE action, he or she bears the burden of proof (by a preponderance of the evidence) on all issues. To justify issuing a PIE, the Director must find that the service agent failed or refused to perform drug and/or alcohol testing services as required by this part or is in serious noncompliance

with a DOT agency drug and alcohol regulation.

Section 40.387 What Matters Does the Director Decide Concerning a Proposed PIE?

Section 40.389 What Factors May the Director Consider?

Section 40.391 What Is the Scope of a PIE?

Section 40.393 How Long Does a PIE Stay in Effect?

Section 40.407 May a Service Agent Ask To Have a PIE Reduced or Terminated?

These sections concern what decisions the Director makes and which factors the Director considers in deciding on whether to issue a PIE, as well as the scope and duration of a PIE. When the Director receives the NOPE and the service agent's response to it, the Director can dismiss the proceeding (*e.g.,* for not raising a sufficiently serious noncompliance issue to warrant issuing a PIE), remand it to the initiating official for more fact finding, or continue with the proceeding. Whenever a proceeding does go to decision, the Director would make determinations concerning disputed factual issues, whether the facts support issuing a PIE, and the scope and duration of a PIE. The factors the Director considers in making these decisions include the seriousness of the noncompliance, the pervasiveness of the noncompliance within the service agent's organization, and the compliance disposition of the service agent.

The scope of a PIE was the subject of many comments. In the final rule, the initiating official proposes a scope for the PIE, the service agent can contest the proposal, and the Director decides what the scope should be. The general rule is that a PIE applies to parts of an organization or types of services that are affected by the service agent's noncompliance. The more pervasive the misconduct, the broader the scope of the PIE. The rule text provides several examples of the Department's thinking on how to view the proper scope of a PIE.

There are also situations in which the PIE can apply to individual officers or employees of the service agent, if they are responsible for the noncompliance that formed the basis for the PIE. This provision is intended to prevent individuals from going into business under a different business or corporate name while a PIE remains in effect against the service agent they worked for. The same is true of businesses affiliated with the service agent concerning which the Department issued a PIE.

A PIE stays in effect from one to five years. Like the scope of a PIE, the duration of a PIE is proposed by the initiating official, may be contested by the service agent, and is decided upon by the ODAPC Director. The Director's decision is based on such factors as the seriousness of the noncompliance on which the PIE is based and the continued need to protect employers and employees from the service agent's noncompliance. The Director considers factors such as those listed in § 40.387 in making this decision.

After a PIE has been in effect for nine months, the service agent can apply to have its duration shortened. If the Director verifies that the sources of noncompliance have been eliminated and that all drug or alcohol testing-related services the service agent would provide to DOT-regulated employers will be consistent with the requirements of this part, the Director may issue a notice terminating or reducing the PIE. We emphasize that this process is limited to the issues of duration and scope: it is not an appeal or reconsideration of the decision to issue the PIE.

Section 40.395 Can You Settle a PIE Proceeding?

Section 40.397 When Does the Director Make a PIE Decision?

Section 40.399 How Does the Department Notify Service Agents of Its Decision?

Section 40.401 How Does the Department Notify Employers and the Public About a PIE?

Section 40.403 Must a Service Agent Notify Its Clients When the Department Issues a PIE?

Section 40.405 May the Federal Courts Review PIE Decisions?

Section 40.413 How Are Notices Sent to Service Agents?

The next group of provisions concern the mechanics of making PIE decisions and informing people about them. The initiating official and the service agent can settle a PIE proceeding at any time before the Director issues a decision. The Director must concur in the settlement, which could include, for example, provisions to ensure compliance or a period of voluntary exclusion during which the service agent agrees not to provide certain services to DOT-regulated employers while it fixes noncompliance problems.

The Director is normally responsible for making a decision within 60 days of the record of the proceeding being completed. The Director can extend this normal decision period for 30 days at a time for good cause. It is the Department's policy to expedite these important decisions, however. Once the Director issues a decision, it is a final administrative action of the Department, subject, like all such actions, to judicial review under the Administrative Procedure Act.

The Director must provide written notice of a PIE to the service agent, including a statement of the basis for his or her decision and the scope and duration of the PIE. The Department also informs the public about the PIE though a web site posting and a **Federal Register** notice. We also anticipate informing employer and testing industry groups about the action, so that they can inform their members. The service agent also has an affirmative responsibility to inform customers about the PIE, so that they can obtain services from and transfer records to other service agents. Finally, § 40.113 concerns the mechanics of how notices are sent to service agents and when they are deemed to have been received. As a policy matter, the initiating official will make reasonable efforts to follow up with the service agent to ensure that the service agent has received and understood the notice.

Section 40.409 What Does the Issuance of a PIE Mean to Transportation Employers?

Employers have an affirmative responsibility to stop using the services of a service agent that is subject to a PIE. This obligation begins 90 days *after* the Director issues the PIE, to give the employer time to find another service provider. The obligation applies to services provided through an affiliate of the service agent subject to the PIE as well as the service agent itself, and it applies to employers in all DOT-regulated industries. It is important to note that a PIE does not invalidate otherwise proper drug and alcohol tests in which the service agent was involved before, and for 90 days after, the issuance of the PIE. The rule text spells out the operation of this provision in more detail.

Appendices

Appendix A

During the last decade of drug testing, the Department has not regulated nor standardized the materials (*i.e.,* collection containers, specimen bottles, etc.) used in DOT-mandated drug

testing. During the first few years of drug testing, only one specimen bottle was required. Subsequent to the Omnibus Act, split specimen collections became a requirement for four of the six DOT agencies. In general, each laboratory provided to the collection site or the employer laboratory specific collection kits, many of which differed in composition.

The introduction of the split, the fact that in the pipeline and maritime industry split collection was an employer option, and the wide variance among the laboratories' kits, resulted in significant problems and numerous tests had to be cancelled based on collector error that, at times, was due to the differences in the makeup of the kits.

Several years ago, the Department requested all laboratories to provide samples of their urine collection kits. These were reviewed against the then current regulatory requirements (*e.g.,* tamper-evident seals on the bottles, availability and use of shipping container seals, collection instructions), and a majority of kits did not meet the regulatory requirements. Laboratories were notified and corrective action was recommended, but the Department did not take any specific action to standardize these kits at that time.

The Department is convinced that the new requirement for all DOT agencies to use splits, and the development of a standard kit, will result in fewer mistakes and cancellations of drug tests. In that light, Appendix A spells out broad criteria for the composition of urine collection kits.

The requirement for a collection container should minimize the need to give the employee both bottles, when there is no collection container in the kit, and request the employee to urinate into only one bottle. In some cases, employees fill both bottles and collectors submit these, resulting in splits that do not reconfirm. In some cases, the two bottles contained urine of different colors, but collectors submitted them anyway.

The requirement that the collection container and the bottles be wrapped or sealed in a plastic bag was established earlier to prevent accusations by the employee that either the collector or someone at the collection site introduced some foreign substance into the containers, causing a positive result. The standards specifically spell out that the collection container needs to be securely wrapped separately from the specimen bottles and that the bottles must be either shrink wrapped or sealed in plastic bags or may be secured with other methodology provided that the tamper-evident mechanism is effective and easily discernable to the employee.

For example, the use of a tiny filament between the bottle and the cap which breaks when the bottle is first opened may be effective in determining if the bottle was opened, but only if the employee has this pointed out to him or her. Even at that, the employee would have to look very closely to see if the filament is or is not attached. Most collectors will not spend the time to go through this process and employees can say they were not really able to tell if the filament was in place. It is much easier to defend and remember that a bottle was wrapped in a plastic bag, rather than argue that the employee was or was not specifically shown the filament or that he or she actually did or did not see the filament. Conversely, a bottle that has a paper label.

The use of a leak-resistant plastic bag has been in place for a number of years, driven primarily by U.S. Postal Service and courier and shipping services requirements as a safety issue related to transportation of biological specimens. Under the new standards, the plastic bags must not only be leak-resistant (no zip locked bags), but must also be tamper-evident. In other words, once the bag is sealed it cannot be opened without the opening becoming obvious.

Under current rules, there is a requirement that the shipping container be sealed with a shipping container seal that is initialed or signed and dated by the collector. In the NPRM, we proposed to use a tamper-evident seal on the plastic bag instead of the shipping container, since in many cases, collectors may collect several specimens in plastic bags and hold or store them until they have several which can then be placed into a shipping contained which is subsequently sealed. There were few comments related to the kit, but laboratories did indicate that when a shipping container, usually a box, arrives at the laboratory with a broken seal, the specimens are tested provided the specimen bottle seals are intact. To date, the Department is not aware of any problems related to this practice. However, it does call into question the purpose of the second (shipping container) seal. The Department's position is that if the leak-resistant plastic bag is tamper-evident, that serves as the secondary protection, which is currently ensured by the shipping seal.

The primary concern is, and always has been, the integrity of the specimen bottle seals. As long as the integrity of the specimen bottle seals is intact, the condition of the shipping container seal is not relevant. The standards listed in Appendix A, therefore, do not include a requirement for a shipping container or plastic bag seal.

The current regulatory requirement is that the ''specimens shall be placed in shipping containers designed to minimize the possibility of damage during shipment (*e.g.,* specimen boxes and/or padded mailers)''. In many cases, kits contain cardboard boxes designed to hold only two bottles for shipment. In some cases, collection sites may, and do, place a number of specimens in plastic bags and then into one large shipping container or box, and transport the specimens in that manner. With the advent of stronger plastics, some laboratories are requesting collection sites to transport bottles wrapped in leak-resistant plastic bags which are placed into larger plastic envelopes, contending that because the specimen bottles are constructed of stronger plastic, this is an acceptable practice.

The Department has discussed this issue of transporting specimens with two of the largest courier services and both have expressed their concerns about leakage of urine specimens in transit and concern for the safety of their employees. Both courier services require a watertight primary receptacle (bottle) and a secondary watertight container, which in this case would be the leak-resistant plastic bag. One courier requires a sturdy outer package consisting of corrugated fiberboard, wood, metal, or rigid plastic; Styrofoam boxes, plastic bags, and paper envelopes are not acceptable as outer packaging. The second major courier requires that the primary container (bottle) meet a 150-pound crush test. If it meets that test, it may be placed in a leak-resistant plastic bag or container and then may be placed in a secondary leak-resistant plastic envelope without further packaging. Conversely, if the bottle(s) does not meet the crush test, it must be placed into a secondary package, which meets the 150-pound crush test. The secondary package may then be placed into a plastic shipping envelope.

The Department has determined that current shipping regulations and requirements are sufficient to ensure that specimens are shipped in a manner that will protect them from damage. Therefore, the standards direct that the specimen bottles be shipped in containers that can sufficiently protect them from damage; the standards do not specify the type of material or the extent of weight (crush test) that the shipping containers should meet. The standards also permit the specimens to be transported to a laboratory in the leak-resistant plastic bag provided they are hand-carried by a laboratory courier. In other words, the courier picks the

specimens up in whatever is a convenient shipping or carrying container and does not subsequently place them into a system (automated transportation, another delivery courier, or on a plane, railroad, or truck), but personally delivers them to the laboratory.

Appendix B

Appendix B is simply a list of the data elements and format for the semi-annual laboratory report provided to employers. Laboratories should follow this format when they compose these reports.

Appendix D

This appendix identifies the format and type of information that the MRO needs to submit to DOT when a split specimen test fails to reconfirm the presence of the drug/drug metabolite, adulterant, or the substitution finding found in the primary specimen.

There has been a long-standing practice under the current rule that when the employee requests a test of the split specimen and the test of the split fails to reconfirm the presence of the drug/drug metabolite that was found in the primary specimen, or if the split was not available (*i.e.,* not collected or leaked in transit), the MRO was required to report this result to the Department. The purpose of this report was to determine if this was an administrative or collection error (*e.g.,* the primary bottle and the split bottle were not the same urine) or if the failure to reconfirm was one of a technical nature, requiring review by HHS. Although the majority of ''failures to reconfirm'' have been due to the unavailability of the split specimen, some of the technical problems led to the discovery of the various adulterants that are currently used to circumvent the testing process. Based on this, the Department will continue to require this reporting by the MRO.

The Department has also decided to permit an employee to request the test of the split specimen when the primary specimen is reported as adulterated or substituted. Based on that decision, we have determined that should the split fail to indicate the adulterant or the substitution is not supported by the test of the split or the MRO cancels the test based on medical evidence, the MRO needs to report this cancellation to the Department in the same manner as if it was a positive result which failed to reconfirm.

There is not a standard ''report'' that the MRO needs to fill out. However, for consistency of information, Appendix D provides the format for the information that the Department needs to fully assess if there are any technical problems in the testing process. For ease of use, the same format can be used for reporting cancellation of a positive as well as for adulteration and substitution.

Appendix E

This Appendix lists the 12 criteria the Department examines in determining whether certification organizations should be accepted under §§ 40.281–40.283 for participation in the SAP program. The first eleven items are the same criteria the Department has used in evaluating other certification organizations that are already part of the program (*e.g.,* ICRC). The twelfth item is NCCA accreditation, discussed in the preamble to § 40.281.

Appendix F

This Appendix is a list of the drug and alcohol testing information transmission functions that C/TPAs are authorized to perform (see § 40.345) C/TPAs may, acting as an intermediary, transmit the information in the listed regulatory sections to the DER for an employer, if the employer chooses to have the C/TPA do so. These are the only items that C/TPAs are permitted to transmit to the employer as an intermediary. The use of service agent intermediaries is prohibited in all other cases, such as transmission of laboratory drug test results to MROs, the transmission of SAP reports to employers, and the transmission of positive alcohol test results.

In every case, the C/TPA must ensure that, in transmitting the information, it meets all requirements (*e.g.,* concerning confidentiality and timing) that would apply if the party originating the information (*e.g.,* an MRO or collector) sent the information directly to the employer. For example, if a C/TPA transmits MROs' drug testing results to DERs, you must transmit each drug test result to the DER in compliance with the requirements for MROs set forth in § 40.157.

Appendix G

The ATF included in Appendix G is a slight modification of the existing alcohol testing form. One commenter suggested that a new alcohol testing form be developed that incorporated requirements proposed by the NPRM (*e.g.,* the name of the DER, whether an STT used a saliva device). We believe that a revised form will serve the program better by allowing us to capture the necessary information. At the same time, it will no longer require the employee to sign in Step 4 if the alcohol concentration is less than 0.02. This signature will only be necessary if the alcohol concentration is 0.02 or higher on the confirmation test. Consistent with the CCF, all pages of the form may be white, with the distribution legend at the bottom of pages 2 and 3 following the colors of the current form. The OMB control number of the new form will be OMB 2105–0529, the same as for the current form. Program participants may start using the form January 18, 2001. Use of the form will become mandatory on August 1, 2001.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule is a significant rule for purposes of Executive Order 12866. It is significant because of its policy importance and its impact upon sizeable industries. It is not, however, an economically significant regulation. It is a reworking of existing requirements, imposing few new mandates, and should not have significant incremental costs. Because of its multimodal impact and policy interest to regulated parties and service agents, it is a significant rule for purposes of the DOT Regulatory Policies and Procedures. Throughout this regulation, we have attempted to balance the costs of new requirements with the cost savings accrued through the elimination of some current requirements.

Economic Impacts

There are two features of the regulation that would add new requirements having economic impacts. The first is the requirement for validity testing. As the result of work by HHS and the laboratories, these protocols are already in place and are being used by most laboratories, so we expect the incremental costs of this requirement to be modest. The Department believes that public safety is well-served by these steps to identify and hold accountable employees in safety-sensitive positions who attempt to tamper with the testing process.

Second, the rule includes additional training requirements for some service agents. Errors in the testing process resulting from lack of training can lead to increased employer program costs and increased paperwork required to document the errors and repeat the testing process. The rule upgrades requirements for collectors, MROs, and SAPs. Well-attended training courses for MROs already exist, as do some collector and SAP courses.

At the same time, the Department anticipates cost savings from some provisions of the regulation, such as the

reductions in blind specimen requirements and mitigation of some reporting requirements. The additional training requirements discussed in the previous paragraphs will help to reduce costs from errors in the system. For example, every time a better-trained collector conducts a collection properly instead of making a mistake, the costs of developing memorandums for correction, preparing laboratory litigation packages, arbitration or court proceedings, and reversing personnel actions are avoided.

The Department has estimated cost increases and decreases that could be expected if the proposed rule's provisions are made final. It is important to understand that this is a big program, touching some 8.34 million employees working for about 673,413 employers. Around 30,000 individuals and organizations work as service agents.

In terms of new costs, the Department estimates an annual cost of about $1.4 million for validity testing. With respect to training for SAPs. MROs, BATs, STTs, and collectors, we anticipate that annual costs will run about $4 million. In addition, we estimate that there will be one-time costs for a variety of administrative requirements in the first year of implementation of approximately $1.93 million.

On the other hand, we anticipate saving at least $4.3 million per year from the reduction in blind specimen testing (the savings will probably be somewhat greater, because fewer organizations will be required to submit blind specimens). By changing the current quarterly laboratory report requirement to require a semiannual report, we anticipate saving another $2.5 million annually. By permitting positive, adulterated, and substituted test results to be faxed rather than sent by overnight express, we project an annual $3.3 million saving. These annual savings are greater than the additional annual costs we anticipate for the proposed rule. In total, then, we estimate that the new rule will result in about $7.4 million in incremental costs versus $10.1 million in incremental savings, compared to the existing rule.

The Department has placed in the docket for this rulemaking a document describing the basis for these estimates in greater detail.

Executive Order 13132 and Federalism

This final rule does not have sufficient Federalism impacts to warrant further action under Executive Order 13132. The Department notes that the provisions of Part 40 are incorporated by reference in the other DOT agency drug and alcohol testing regulations, which have existing pre-emption provisions in them. Consequently, for example, a provision of a state or local law or regulation that conflicted with a provision of Part 40 could be subject to pre-emption on the basis of this existing operating administration authority.

Regulatory Flexibility Act

With respect to the Regulatory Flexibility Act, the Department certifies that this rule does not have a significant economic impact on a substantial number of small entities, so a Regulatory Flexibility analysis has not been prepared. It is clear that the rule affects large numbers of small entities. Many thousands of covered employers are small businesses (*e.g.,* small trucking companies, small transit authorities), as are many service agents (*e.g.,* occupational health clinics). Given the small, and overall favorable, net change in regulatory costs compared to the present rule, spread over these thousands of small entitites, the cost impact per entity is expected to be negligible.

We have also taken some steps, such as the reduction in blind specimens, the reduced frequency of some reports, and the discretion we have given C/TPAs to act as intermediaries in some situations, that should assist small entities in complying and reduce their burdens. For the smallest entities (*e.g.,* owner-operators), we have also permitted C/TPAs to perform some additional functions. The PIE provision should reduce costs to small employers as the result of noncompliance by service agents. Our ability to create special provisions for small entities is limited by the need to have uniform requirements to ensure safety and fairness to employees. There must be a single standard for the accuracy and integrity of the program and the protection of legitimate employee interests that cannot vary with the size of the employer or service agent.

This rulemaking resulted from a ''610 Review'' under the Regulatory Flexibility Act. We have reviewed the existing program to identify areas in which the rule can be improved with the effect of assisting small businesses to comply in a rational and cost-effective manner. In addition to the general clarification of the program this rule provides, we have identified some specific areas (*e.g.,* blind specimen requirements, the addition of the public interest exclusion provision, the reduction in reporting frequencies, the discretionary use of C/TPAs to transmit information) that should be particularly helpful to small regulated employers.

Paperwork Reduction Act

Since the inception of the Department's drug and alcohol testing program, each individual DOT agency has complied with the requirements of the Paperwork Reduction Act (PRA) by submitting a justification to the Office of Management and Budget (OMB). These PRA submissions reflected requirements derived from the respective DOT agency drug and alcohol regulations as well as from Part 40. The submissions were never presented to OMB in a coordinated fashion, nor were they reviewed together to ensure that all drug and alcohol program requirements were reflected in a manner that was consistent, accurate, and non-duplicative.

In January 2000, the Department began an effort to evaluate prior PRA submissions in an attempt to address disparities between DOT agency estimates as well as the aggregate burden and cost estimates. A One-DOT group was formed. Its goals were to bring consistency and simplicity to DOT's PRA submissions; eliminate PRA submission duplication between and among DOT agencies, OST, and other Federal agencies; eliminate PRA submission discrepancies; and, more importantly perhaps, ensure accuracy of submissions. In addition, the group decided to standardize cost, hour, and wage indicators, where possible, and to identify task commonalities in DOT agency regulations and standardize how they are reported to OMB. The group sought to determine where program PRA responsibilities for specific drug and alcohol program elements lie—with the DOT agencies, OST, or other Federal agencies.

The group identified a total of 37 PRA tasks contained in one or more of the regulations of six DOT agencies (*i.e.,* that properly reside in the operating administration rules rather than in Part 40). Some tasks were shared by all or some DOT agencies, while other tasks were peculiar to only one DOT agency. The operating administrations subsequently made PRA submissions to OMB for these items, which OMB approved. These submissions resulted in a reduction in the paperwork burden attributable to operating administration rules, both because Part 40-related burdens were kept separate and because a significant overestimate of the burden connected with one of the operating administration programs was corrected. The total reduction was over 50 million hours.

Next, the Department constructed a baseline for the information collection burden attributable to the existing Part

40 (most of which had not previously been accounted for in PRA submissions or had been subsumed under operating administration submissions). This baseline is approximately 2.23 million hours. The Department submitted a PRA request to OMB concerning this material, which OMB has approved.

Third, the Department compared the information collection burden of the existing Part 40 baseline to the estimated burden for the new Part 40. Comparing the existing rule to the new rule, there are some items that increase (*e.g.,* obtaining test results from previous employers, MRO review of negative test documentation, employer SAP lists being provided to employees), in part because they previously were accounted for under operating administration rules. Other items decreased (*e.g.,* changing from quarterly to semi-annual laboratory reports). The largest decrease resulted from the drug testing form's burden hours being accounted for under the PRA responsibility of HHS. Cumulatively, the new Part 40's information collection burden is approximately about 842 thousand hours, or about 1.39 million hours less than that of the existing Part 40.

For informational purposes, the Department has placed its entire Paperwork Reduction Act package on the internet, on the same Docket Management System web site on which comments on this rulemaking are posted. Interested persons may review this material electronically. The following web address provides instructions and access to the DOT electronic docket: *http://dms.dot.gov/search/.* To find the material on the Part 40 rulemaking, just enter the number 6578 in the ''docket number'' search dialog box.

In addition, we note that § 40.25, which requires employers to obtain information from applicants about previous drug and alcohol test results, was not previously the subject of PRA-related comment. While this section is part of the PRA package OMB has approved in connection with Part 40, you may comment about the information collection aspects of the section. Please send any comments to Jim L. Swart, Drug and Alcohol Policy Advisor, Office of Drug and Alcohol Policy and Compliance (ODAPC), 400 7th Street, SW., Room 10403, Washington, DC 20590, 202–366–3784 (voice), 202–366–3897 (fax), or *jim.swart@ost.dot.gov* (e-mail).

Other Executive Orders

There are a number of other Executive Orders that can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the context of this rule, and we believe that the rule does not directly affect the matters that the Executive Orders cover. We have prepared this rulemaking in accordance with the Presidential Directive on Plain Language.

List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued this 1st day of December 2000, at Washington, DC.

Rodney E. Slater,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR subtitle A as follows:

1. Effective January 18, 2001, amend the current 49 CFR part 40 as follows:

PART 40—[AMENDED]

a. The authority citation for Part 40 is revised to read as follows:

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*

b. Add Subparts E and F to read as follows:

Subpart E—Additional Administrative Provisions and Validity Testing

Sec.

Subpart F—Public Interest Exclusions

Subpart E—Additional Administrative Provisions and Validity Testing

§ 40.201 Additional definitions.

The following definitions apply to the provisions of this subpart E and subpart F of this part:

Adulterated specimen. A specimen that contains a substance that is not expected to be present in human urine, or contains a substance expected to be present but is at a concentration so high that it is not consistent with human urine.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to: interlocking management or ownership; shared interest among family members; shared facilities or equipment; or common use of employees. Following the issuance of a public interest exclusion, an organization having the same or similar management, ownership, or principal employees as the service agent concerning whom a public interest exclusion is in effect is regarded as an affiliate. This definition is used in connection with the public interest exclusion procedures of Subpart F of this part.

Confirmation (or confirmatory) validity test. A second test performed on a urine specimen to further support a validity test result.

Dilute specimen. A specimen with creatinine and specific gravity values that are lower than expected for human urine.

Initial validity test. The first test used to determine if a specimen is adulterated, diluted, or substituted.

Office of Drug and Alcohol Policy and Compliance (ODAPC). The office in the Office of the Secretary, DOT, that is responsible for coordinating drug and alcohol testing program matters within the Department and providing information concerning the implementation of this part.

Split specimen. In drug testing, a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result.

Substituted specimen. A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine.

§ 40.203 Who issues authoritative interpretations of this regulation?

ODAPC and the DOT Office of General Counsel (OGC) provide written interpretations of the provisions of this part. These written DOT interpretations are the only official and authoritative interpretations concerning the provisions of this part. DOT agencies may incorporate ODAPC/OGC interpretations in written guidance they issue concerning drug and alcohol testing matters.

§ 40.205 What is validity testing, and are laboratories authorized to conduct it?

(a) Specimen validity testing is the evaluation of the specimen to determine if it is consistent with normal human urine. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted.

(b) As a laboratory, you are authorized to conduct validity testing.

§ 40.207 What validity tests must laboratories conduct on primary specimens?

As a laboratory, if you conduct validity testing under the authorization of § 40.205(b), you must conduct it in accordance with the requirements of this section.

(a) You must test each primary specimen for creatinine. You must also determine its specific gravity if you find that the creatinine concentration is less than 20 mg/dL.

(b) You must measure the pH of each primary specimen.

(c) You must test each primary specimen to determine if it contains substances that may be used to adulterate the specimen. Your tests must have the capability of determining whether any substance identified in current HHS requirements or specimen validity guidance is present in the specimen.

(d) If you suspect the presence of an interfering substance/adulterant that could make a test result invalid, but you are unable to identify it (*e.g.,* a new adulterant), you may, as the first laboratory, send the specimen to another HHS certified laboratory that has the capability of doing so.

(e) If you identify a substance in a specimen that appears to be an adulterant, but which is not listed in current HHS requirements or guidance, you must report the finding in writing to ODAPC and the Division of Workplace Programs, HHS, within three business days. You must also complete testing of the specimen for drugs, to the extent technically feasible.

(f) You must conserve as much as possible of the specimen for possible future testing.

§ 40.209 What criteria do laboratories use to establish that a specimen is dilute or substituted?

(a) As a laboratory you must consider the primary specimen to be dilute if the creatinine concentration is less than 20 mg/dL *and* the specific gravity is less than 1.003, unless the criteria for a substituted specimen are met.

(b) As a laboratory you must consider the primary specimen to be substituted if the creatinine concentration is less than or equal to 5 mg/dL *and* the specific gravity is less than or equal to 1.001 or greater than or equal to 1.020.

§ 40.211 What criteria do laboratories use to establish that a specimen is adulterated?

(a) As a laboratory, you must consider the primary specimen to be adulterated if you determine that—

(1) A substance that is not expected to be present in human urine is identified in the specimen;

(2) A substance that is expected to be present in human urine is identified at a concentration so high that it is not consistent with human urine; or

(3) The physical characteristics of the specimen are outside the normal expected range for human urine.

(b) In making your determination under paragraph (a) of this section, you must apply the criteria in current HHS requirements or specimen validity guidance.

§ 40.213 How long does the laboratory retain specimens after testing?

(a) As a laboratory testing the primary specimen, you must retain a specimen that was reported with positive, adulterated, substituted, or invalid results for a minimum of one year.

(b) You must keep such a specimen in secure, long-term, frozen storage in accordance with HHS requirements.

(c) Within the one-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain a specimen for an additional period of time (*e.g.,* for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the specimen at the end of the year.

(d) If you have not sent the split specimen to another laboratory for testing, you must retain the split specimen for an employee's test for the same period of time that you retain the primary specimen and under the same storage conditions.

(e) As the laboratory testing the split specimen, you must meet the requirements of paragraphs (a) through (c) of this section with respect to the split specimen.

§ 40.215 On what basis does the MRO verify test results involving adulteration or substitution?

(a) As an MRO, when you receive a laboratory report that a specimen is adulterated or substituted, you must treat that report in the same way you treat the laboratory's report of a confirmed positive test for a drug or drug metabolite.

(b) You must follow the same procedures used for verification of a confirmed positive test for a drug or drug except as otherwise provided in this section.

(c) In the verification interview, you must explain the laboratory findings to the employee and address technical questions or issues the employee may raise.

(d) You must offer the employee the opportunity to present a legitimate medical explanation for the laboratory findings with respect to presence of the adulterant in, or the creatinine and specific gravity findings for, the specimen.

(e) The employee has the burden of proof that there is a legitimate medical explanation.

(1) To meet this burden in the case of an adulterated specimen, the employee must demonstrate that the adulterant found by the laboratory entered the specimen through physiological means.

(2) To meet this burden in the case of a substituted specimen, the employee must demonstrate that he or she did produce or could have produced urine, through physiological means, meeting the creatinine and specific gravity criteria of § 40.209(b).

(3) The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the specimen, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence supporting a legitimate medical explanation within that time.

(f) As the MRO or the employer, you are not responsible for arranging, conducting, or paying for any studies, examinations or analyses to determine whether a legitimate medical explanation exists.

(g) As the MRO, you must exercise your best professional judgment in deciding whether the employee has established a legitimate medical explanation.

(1) If you determine that the employee's explanation does not present a reasonable basis for concluding that there may be a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution, as applicable.

(2) If you believe that the employee's explanation may present a reasonable basis for concluding that there is a legitimate medical explanation, you must direct the employee to obtain, within the five-day period set forth in paragraph (e)(3) of this section, a further medical evaluation. This evaluation must be performed by a licensed physician (the ''referral physician''), acceptable to you, with expertise in the medical issues raised by the employee's explanation. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(i) As the MRO or employer, you are not responsible for finding or paying a referral physician. However, on request of the employee, you must provide reasonable assistance to the employee's efforts to find such a physician. The final choice of the referral physician is the employee's, as long as the physician is acceptable to you.

(ii) As the MRO, you must consult with the referral physician, providing guidance to him or her concerning his or her responsibilities under this section. As part of this consultation, you must provide the following information to the referral physician:

(A) That the employee was required to take a DOT drug test, but the laboratory reported that the specimen was adulterated or substituted, which is treated as a refusal to test;

(B) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(C) That the referral physician must agree to follow the requirements of paragraphs (g)(3) through (g)(4) of this section; and

(D) That the referral physician must provide you with a signed statement of his or her recommendations.

(3) As the referral physician, you must evaluate the employee and consider any evidence the employee presents concerning the employee's medical explanation. You may conduct additional tests to determine whether there is a legitimate medical explanation. Any additional urine tests must be performed in an HHS-certified laboratory.

(4) As the referral physician, you must then make a written recommendation to the MRO about whether the MRO should determine that there is a legitimate medical explanation. As the MRO, you must seriously consider and assess the referral physician's recommendation in deciding whether there is a legitimate medical explanation.

(5) As the MRO, if you determine that there is a legitimate medical explanation, you must cancel the test and inform ODAPC in writing of the determination and the basis for it (*e.g.,* referral physician's findings, evidence produced by the employee).

(6) As the MRO, if you determine that there is not a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution.

(h) The following are examples of types of evidence an employee could present to support an assertion of a legitimate medical explanation for a substituted result:

(1) Medically valid evidence demonstrating that the employee is capable of physiologically producing urine meeting the creatinine and specific gravity criteria of § 40.209(b).

(i) To be regarded as medically valid, the evidence must have been gathered using appropriate methodology and controls to ensure its accuracy and reliability.

(ii) Assertion by the employee that his or her personal characteristics (*e.g.,* with respect to race, gender, weight, diet, working conditions) are responsible for the substituted result does not, in itself, constitute a legitimate medical explanation. To make a case that there is a legitimate medical explanation, the employee must present evidence showing that the cited personal characteristics actually result in the physiological production of urine meeting the creatinine and specific gravity criteria of § 40.209 (b).

(2) Information from a medical evaluation under paragraph (g) of this section that the individual has a medical condition that has been demonstrated to cause the employee to physiologically produce urine meeting the creatinine and specific gravity criteria of § 40.209(b).

(i) A finding or diagnosis by the physician that an employee has a medical condition, in itself, does not constitute a legitimate medical explanation.

(ii) To establish there is a legitimate medical explanation, the employee must demonstrate that the cited medical condition actually results in the physiological production of urine meeting the creatinine and specific gravity criteria of § 40.209(b).

§ 40.217 What does the second laboratory do with the split specimen when it is tested to reconfirm an adulterated test result?

As the laboratory testing the split specimen, you must test the split specimen for the adulterant detected in the primary specimen using the same criteria that were used for the primary specimen or HHS guidance, as applicable. The result of the primary specimen is reconfirmed if the split specimen meets these criteria.

§ 40.219 What does the second laboratory do with the split specimen when it is tested to reconfirm a substituted test result?

As the laboratory testing the split specimen, you must test the split specimen using the criteria of § 40.209(b), just as you would do for a primary specimen. The result of the primary specimen is reconfirmed if the split specimen meets these criteria.

§ 40.221 What information do laboratories report to MROs regarding split specimen results?

(a) As the laboratory responsible for testing the split specimen, and you are using the Federal Testing Custody and Control Form (CCF) issued by HHS on June 23, 2000, you must report split specimen test results in adulteration and substitution situations by checking the ''Reconfirmed'' box or the ''Failed to Reconfirm'' box (Step 5(b)) on Copy 1 of the CCF.

(b) If you check the ''Failed to Reconfirm'' box, one of the following statements must be included (as appropriate) on the ''Reason'' line (Step 5(b)):

(1) Drug(s)/metabolite(s) not detected.''

(2) ''Adulterant not found within criteria.''

(3) ''Specimen not consistent with substitution criteria [specify creatinine, specific gravity, or both]''

(4) ''Specimen not available for testing.''

(c) If you are using the CCF issued by HHS prior to June 23, 2000, enter the information referenced in paragraph (b) (2), (3), or (4) of this section on the ''remarks'' line.

(d) As the laboratory certifying scientist, enter your name, sign, and date the CCF.

§ 40.223 What does the MRO do with split specimen laboratory results?

As an MRO, you must take the following actions when a laboratory reports the following results of split specimen tests concerning adulterated or substituted specimens:

(a) *Reconfirmed.* (1) In the case of a reconfirmed positive test for a drug or drug metabolite, report the reconfirmation to the DER and the employee.

(2) In the case of a reconfirmed adulterated or substituted result, report to the DER and the employee that the specimen was adulterated or substituted, either of which constitutes a refusal to test. Therefore, ''refusal to test'' is the final result.

(b) *Failed to Reconfirm: Drug(s)/Drug Metabolite(s) Not Detected.* (1) Report to the DER and the employee that both tests must be cancelled.

(2) Inform ODAPC of the failure to reconfirm.

(c) *Failed to Reconfirm: Adulterated or Substituted (as appropriate); Criteria Not Met.* (1) Report to the DER and the employee that both tests must be cancelled.

(2) Inform ODAPC of the failure to reconfirm.

(d) *Failed to Reconfirm: Specimen not Available for Testing.* (1) Report to the DER and the employee that both tests must be cancelled and the reason for cancellation.

(2) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(3) Inform ODAPC of the failure to reconfirm.

(e) Enter your name, sign and date the appropriate copy of the CCF.

(f) Send a legible copy of the appropriate copy of the CCF (or a signed and dated letter) to the employer and keep a copy for your records.

§ 40.225 What is a refusal to take a DOT drug test, and what are the consequences?

(a) [Reserved]

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(d) [Reserved]

(e) [Reserved]

Subpart F—Public Interest Exclusions

§§ 40.301–40.359 [Reserved]

§ 40.361 What is the purpose of a public interest exclusion (PIE)?

(a) To protect the public interest, including protecting transportation employers and employees from serious noncompliance with DOT drug and alcohol testing rules, the Department's policy is to ensure that employers conduct business only with responsible service agents.

(b) The Department therefore uses PIEs to exclude from participation in DOT's drug and alcohol testing program any service agent who, by serious noncompliance with this part or other DOT agency drug and alcohol testing regulations, has shown that it is not currently acting in a responsible manner.

(c) A PIE is a serious action that the Department takes only to protect the public interest. We intend to use PIEs only to remedy situations of serious noncompliance. PIEs are not used for the purpose of punishment.

(d) Nothing in this subpart precludes a DOT agency or the Inspector General from taking other action authorized by its regulations with respect to service agents or employers that violate its regulations.

§ 40.363 On what basis may the Department issue a PIE?

(a) If you are a service agent, the Department may issue a PIE concerning you if we determine that you have failed or refused to provide drug or alcohol testing services consistent with the requirements of this part or a DOT agency drug and alcohol regulation.

(b) The Department also may issue a PIE if you have failed to cooperate with DOT agency representatives concerning inspections, complaint investigations, compliance and enforcement reviews, or requests for documents and other information about compliance with this part or DOT agency drug and alcohol regulations.

§ 40.365 What is the Department's policy concerning starting a PIE proceeding?

(a) It is the Department's policy to start a PIE proceeding only in cases of serious, uncorrected noncompliance with the provisions of this part, affecting such matters as safety, the outcomes of test results, privacy and confidentiality, due process and fairness for employees, the honesty and integrity of the testing program, and cooperation with or provision of information to DOT agency representatives.

(b) The following are examples of the kinds of serious noncompliance that, as a matter of policy, the Department views as appropriate grounds for starting a PIE proceeding. These examples are not intended to be an exhaustive or exclusive list of the grounds for starting a PIE proceeding. We intend them to illustrate the level of seriousness that the Department believes supports starting a PIE proceeding. The examples follow:

(1) For an MRO, verifying tests positive without interviewing the

employees as required by this part or providing MRO services without meeting the qualifications for an MRO required by this part;

(2) For a laboratory, refusing to provide information to the Department, an employer, or an employee as required by this part; or a pattern or practice of testing errors that result in the cancellation of tests. (As a general matter of policy, the Department does not intend to initiate a PIE proceeding concerning a laboratory with respect to matters on which HHS initiates certification actions under its laboratory guidelines.);

(3) For a collector, a pattern or practice of directly observing collections when doing so is unauthorized, or failing or refusing to directly observe collections when doing so is mandatory;

(4) For collectors, BATs, or STTs, a pattern or practice of using forms, testing equipment, or collection kits that do not meet the standards in this part;

(5) For a collector, BAT, or STT, a pattern or practice of ''fatal flaws'' or other significant uncorrected errors in the collection process;

(6) For a laboratory, MRO or C/TPA, failing or refusing to report tests results as required by this part or DOT agency regulations;

(7) For a laboratory, falsifying, concealing, or destroying documentation concerning any part of the drug testing process, including, but not limited to, documents in a ''litigation package'';

(8) For SAPs, providing SAP services while not meeting SAP qualifications required by this part or performing evaluations without face-to-face interviews;

(9) For any service agent, maintaining a relationship with another party that constitutes a conflict of interest under this part (*e.g.,* a laboratory that derives a financial benefit from having an employer use a specific MRO);

(10) For any service agent, representing falsely that the service agent or its activities is approved or certified by the Department or a DOT agency;

(11) For any service agent, disclosing an employee's test result information to any party this part or a DOT agency regulation does not authorize, including by obtaining a ''blanket'' consent from employees or by creating a data base from which employers or others can retrieve an employee's DOT test results without the specific consent of the employee;

(12) For any service agent, interfering or attempting to interfere with the ability of an MRO to communicate with the Department, or retaliating against an MRO for communicating with the Department;

(13) For any service agent, directing or recommending that an employer fail or refuse to implement any provision of this part; or

(14) With respect to noncompliance with a DOT agency regulation, conduct that affects important provisions of Department-wide concern (*e.g.,* failure to properly conduct the selection process for random testing).

§ 40.367 Who initiates a PIE proceeding?

The following DOT officials may initiate a PIE proceeding:

(a) The drug and alcohol program manager of a DOT agency;

(b) An official of ODAPC, other than the Director; or

(c) The designee of any of these officials.

§ 40.369 What is the discretion of an initiating official in starting a PIE proceeding?

(a) Initiating officials have broad discretion in deciding whether to start a PIE proceeding.

(b) In exercising this discretion, the initiating official must consider the Department's policy regarding the seriousness of the service agent's conduct (see § 40.365) and all information he or she has obtained to this point concerning the facts of the case. The initiating official may also consider the availability of the resources needed to pursue a PIE proceeding.

(c) A decision not to initiate a PIE proceeding does not necessarily mean that the Department regards a service agent as being in compliance or that the Department may not use other applicable remedies in a situation of noncompliance.

§ 40.371 On what information does an initiating official rely in deciding whether to start a PIE proceeding?

(a) An initiating official may rely on credible information from any source as the basis for starting a PIE proceeding.

(b) Before sending a correction notice (see § 40.373), the initiating official informally contacts the service agent to determine if there is any information that may affect the initiating official's determination about whether it is necessary to send a correction notice. The initiating official may take any information resulting from this contact into account in determining whether to proceed under this subpart.

§ 40.373 Before starting a PIE proceeding, does the initiating official give the service agent an opportunity to correct problems?

(a) If you are a service agent, the initiating official must send you a correction notice before starting a PIE proceeding.

(b) The correction notice identifies the specific areas in which you must come into compliance in order to avoid being subject to a PIE proceeding.

(c) If you make and document changes needed to come into compliance in the areas listed in the correction notice to the satisfaction of the initiating official within 60 days of the date you receive the notice, the initiating official does not start a PIE proceeding. The initiating official may conduct appropriate fact finding to verify that you have made and maintained satisfactory corrections. When he or she is satisfied that you are in compliance, the initiating official sends you a notice that the matter is concluded.

§ 40.375 How does the initiating official start a PIE proceeding?

(a) As a service agent, if your compliance matter is not correctable (see § 40.373(a)), or if have not resolved compliance matters as provided in § 40.373(c), the initiating official starts a PIE proceeding by sending you a notice of proposed exclusion (NOPE). The NOPE contains the initiating official's recommendations concerning the issuance of a PIE, but it is not a decision by the Department to issue a PIE.

(b) The NOPE includes the following information:

(1) A statement that the initiating official is recommending that the Department issue a PIE concerning you;

(2) The factual basis for the initiating official's belief that you are not providing drug and/or alcohol testing services to DOT-regulated employers consistent with the requirements of this part or are in serious noncompliance with a DOT agency drug and alcohol regulation;

(3) The factual basis for the initiating official's belief that your noncompliance has not been or cannot be corrected;

(4) The initiating official's recommendation for the scope of the PIE;

(5) The initiating official's recommendation for the duration of the PIE; and

(6) A statement that you may contest the issuance of the proposed PIE, as provided in § 40.379.

(c) The initiating official sends a copy of the NOPE to the ODAPC Director at the same time he or she sends the NOPE to you.

§ 40.377 Who decides whether to issue a PIE?

(a) The ODAPC Director, or his or her designee, decides whether to issue a PIE. If a designee is acting as the

decisionmaker, all references in this subpart to the Director refer to the designee.

(b) To ensure his or her impartiality, the Director plays no role in the initiating official's determination about whether to start a PIE proceeding.

(c) There is a ''firewall'' between the initiating official and the Director. This means that the initiating official and the Director are prohibited from having any discussion, contact, or exchange of information with one another about the matter, except for documents and discussions that are part of the record of the proceeding.

§ 40.379 How do you contest the issuance of a PIE?

(a) If you receive a NOPE, you may contest the issuance of the PIE.

(b) If you want to contest the proposed PIE, you must provide the Director information and argument in opposition to the proposed PIE in writing, in person, and/or through a representative. To contest the proposed PIE, you must take one or more of the steps listed in this paragraph (b) within 30 days after you receive the NOPE.

(1) You may request that the Director dismiss the proposed PIE without further proceedings, on the basis that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(2) You may present written information and arguments, consistent with the provisions of § 40.381, contesting the proposed PIE.

(3) You may arrange with the Director for an informal meeting to present your information and arguments.

(c) If you do not take any of the actions listed in paragraph (b) of this section within 30 days after you receive the NOPE, the matter proceeds as an uncontested case. In this event, the Director makes his or her decision based on the record provided by the initiating official (*i.e.,* the NOPE and any supporting information or testimony) and any additional information the Director obtains.

§ 40.381 What information do you present to contest the proposed issuance of a PIE?

(a) As a service agent who wants to contest a proposed PIE, you must present at least the following information to the Director:

(1) Specific facts that contradict the statements contained in the NOPE (see § 40.375(b)(2) and (3)). A general denial is insufficient to raise a genuine dispute over facts material to the issuance of a PIE;

(2) Identification of any existing, proposed or prior PIE; and

(3) Identification of your affiliates, if any.

(b) You may provide any information and arguments you wish concerning the proposed issuance, scope and duration of the PIE (see § 40.375(b)(4) and (5).

(c) You may provide any additional relevant information or arguments concerning any of the issues in the matter.

§ 40.383 What procedures apply if you contest the issuance of a PIE?

(a) DOT conducts PIE proceedings in a fair and informal manner. The Director may use flexible procedures to allow you to present matters in opposition. The Director is not required to follow formal rules of evidence or procedure in creating the record of the proceeding.

(b) The Director will consider any information or argument he or she determines to be relevant to the decision on the matter.

(c) You may submit any documentary evidence you want the Director to consider. In addition, if you have arranged an informal meeting with the Director, you may present witnesses and confront any person the initiating official presents as a witness against you.

(d) In cases where there are material factual issues in dispute, the Director or his or her designee may conduct additional fact-finding.

(e) If you have arranged a meeting with the Director, the Director will make a transcribed record of the meeting available to you on your request. You must pay the cost of transcribing and copying the meeting record.

§ 40.385 Who bears the burden of proof in a PIE proceeding?

(a) As the proponent of issuing a PIE, the initiating official bears the burden of proof.

(b) This burden is to demonstrate, by a preponderance of the evidence, that the service agent was in serious noncompliance with the requirements of this part for drug and/or alcohol testing-related services or with the requirements of another DOT agency drug and alcohol testing regulation.

§ 40.387 What matters does the Director decide concerning a proposed PIE?

(a) Following the service agent's response (see § 40.379(b)) or, if no response is received, after 30 days have passed from the date on which the service agent received the NOPE, the Director may take one of the following steps:

(1) In response to a request from the service agent (see § 40.379(b)(1)) or on his or her own motion, the Director may dismiss a PIE proceeding if he or she determines that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(i) If the Director dismisses a proposed PIE under this paragraph (a), the action is closed with respect to the noncompliance alleged in the NOPE.

(ii) The Department may initiate a new PIE proceeding against you on the basis of different or subsequent conduct that is in noncompliance with this part or other DOT drug and alcohol testing rules.

(2) If the Director determines that the initiating official's submission does not have complete information needed for a decision, the Director may remand the matter to the initiating official. The initiating official may resubmit the matter to the Director when the needed information is complete. If the basis for the proposed PIE has changed, the initiating official must send an amended NOPE to the service agent.

(b) The Director makes determinations concerning the following matters in any PIE proceeding that he or she decides on the merits:

(1) Any material facts that are in dispute;

(2) Whether the facts support issuing a PIE;

(3) The scope of any PIE that is issued; and

(4) The duration of any PIE that is issued.

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

(a) The actual or potential harm that results or may result from your noncompliance;

(b) The frequency of incidents and/or duration of the noncompliance;

(c) Whether there is a pattern or prior history of noncompliance;

(d) Whether the noncompliance was pervasive within your organization, including such factors as the following:

(1) Whether and to what extent your organization planned, initiated, or carried out the noncompliance;

(2) The positions held by individuals involved in the noncompliance, and

whether your principals tolerated their noncompliance; and

(3) Whether you had effective standards of conduct and control systems (both with respect to your own organization and any contractors or affiliates) at the time the noncompliance occurred;

(e) Whether you have demonstrated an appropriate compliance disposition, including such factors as the following:

(1) Whether you have accepted responsibility for the noncompliance and recognize the seriousness of the conduct that led to the cause for issuance of the PIE;

(2) Whether you have cooperated fully with the Department during the investigation. The Director may consider when the cooperation began and whether you disclosed all pertinent information known to you;

(3) Whether you have fully investigated the circumstances of the noncompliance forming the basis for the PIE and, if so, have made the result of the investigation available to the Director;

(4) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the grounds for issuance of the PIE; and

(5) Whether your organization has taken appropriate corrective actions or remedial measures, including implementing actions to prevent recurrence;

(f) With respect to noncompliance with a DOT agency regulation, the degree to which the noncompliance affects matters common to the DOT drug and alcohol testing program;

(g) Other factors appropriate to the circumstances of the case.

§ 40.391 What is the scope of a PIE?

(a) The scope of a PIE is the Department's determination about the divisions, organizational elements, types of services, affiliates, and/or individuals (including direct employees of a service agent and its contractors) to which a PIE applies.

(b) If, as a service agent, the Department issues a PIE concerning you, the PIE applies to all your divisions, organizational elements, and types of services that are involved with or affected by the noncompliance that forms the factual basis for issuing the PIE.

(c) In the NOPE (see § 40.375(b)(4)), the initiating official sets forth his or her recommendation for the scope of the PIE. The proposed scope of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(3)).

(d) In recommending and deciding the scope of the PIE, the initiating official and Director, respectively, must take into account the provisions of paragraphs (e) through (j) of this section.

(e) The pervasiveness of the noncompliance within a service agent's organization (see § 40.389(d)) is an important consideration in determining the scope of a PIE. The appropriate scope of a PIE grows broader as the pervasiveness of the noncompliance increases.

(f) The application of a PIE is not limited to the specific location or employer at which the conduct that forms the factual basis for issuing the PIE was discovered.

(g) A PIE applies to your affiliates, if the affiliate is involved with or affected by the conduct that forms the factual basis for issuing the PIE.

(h) A PIE applies to individuals who are officers, employees, directors, shareholders, partners, or other individuals associated with your organization in the following circumstances:

(1) Conduct forming any part of the factual basis of the PIE occurred in connection with the individual's performance of duties by or on behalf of your organization; or

(2) The individual knew of, had reason to know of, approved, or acquiesced in such conduct. The individual's acceptance of benefits derived from such conduct is evidence of such knowledge, acquiescence, or approval.

(i) If a contractor to your organization is solely responsible for the conduct that forms the factual basis for a PIE, the PIE does not apply to the service agent itself unless the service agent knew or should have known about the conduct and did not take action to correct it.

(j) PIEs do not apply to drug and alcohol testing that DOT does not regulate.

(k) The following examples illustrate how the Department intends the provisions of this section to work:

Example 1 to § 40.391. Service Agent P provides a variety of drug testing services. P's SAP services are involved in a serious violation of this Part 40. However, P's other services fully comply with this part, and P's overall management did not plan or concur in the noncompliance, which in fact was contrary to P's articulated standards. Because the noncompliance was isolated in one area of the organization's activities, and did not pervade the entire organization, the scope of the PIE could be limited to SAP services.

Example 2 to § 40.391. Service Agent Q provides a similar variety of services. The conduct forming the factual basis for a PIE concerns collections for a transit authority. As in Example 1, the noncompliance is not pervasive throughout Q's organization. The PIE would apply to collections at all locations served by Q, not just the particular transit authority or not just in the state in which the transit authority is located.

Example 3 to § 40.391. Service Agent R provides a similar array of services. One or more of the following problems exists: R's activities in several areas—collections, MROs, SAPs, protecting the confidentiality of information—are involved in serious noncompliance; DOT determines that R's management knew or should have known about serious noncompliance in one or more areas, but management did not take timely corrective action; or, in response to an inquiry from DOT personnel, R's management refuses to provide information about its operations. In each of these three cases, the scope of the PIE would include all aspects of R's services.

Example 4 to § 40.391. Service Agent W provides only one kind of service (*e.g.,* laboratory or MRO services). The Department issues a PIE concerning these services. Because W only provides this one kind of service, the PIE necessarily applies to all its operations.

Example 5 to § 40.391. Service Agent X, by exercising reasonably prudent oversight of its collection contractor, should have known that the contractor was making numerous ''fatal flaws'' in tests. Alternatively, X received a correction notice pointing out these problems in its contractor's collections. In neither case did X take action to correct the problem. X, as well as the contractor, would be subject to a PIE with respect to collections.

Example 6 to § 40.391. Service Agent Y could not reasonably have known that one of its MROs was regularly failing to interview employees before verifying tests positive. When it received a correction notice, Y immediately dismissed the erring MRO. In this case, the MRO would be subject to a PIE but Y would not.

Example 7 to § 40.391. The Department issues a PIE with respect to Service Agent Z. Z provides services for DOT-regulated transportation employers, a Federal agency under the HHS-regulated Federal employee testing program, and various private businesses and public agencies that DOT does not regulate. The PIE applies only to the DOT-regulated transportation employers with respect to their DOT-mandated testing, not to the Federal agency or the other public agencies and private businesses. The PIE does not prevent the non-DOT regulated entities from continuing to use Z's services.

§ 40.393 How long does a PIE stay in effect?

(a) In the NOPE (see § 40.375(b)(5)), the initiating official proposes the duration of the PIE. The duration of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(4)).

(b) In deciding upon the duration of the PIE, the Director considers the

seriousness of the conduct on which the PIE is based and the continued need to protect employers and employees from the service agent's noncompliance. The Director considers factors such as those listed in § 40.389 in making this decision.

(c) The duration of a PIE will be between one and five years, unless the Director reduces its duration under § 40.407.

§ 40.395 Can you settle a PIE proceeding?

At any time before the Director's decision, you and the initiating official can, with the Director's concurrence, settle a PIE proceeding.

§ 40.397 When does the Director make a PIE decision?

The Director makes his or her decision within 60 days of the date when the record of a PIE proceeding is complete (including any meeting with the Director and any additional fact-finding that is necessary). The Director may extend this period for good cause for additional periods of up to 30 days.

§ 40.399 How does the Department notify service agents of its decision?

If you are a service agent involved in a PIE proceeding, the Director provides you written notice as soon as he or she makes a PIE decision. The notice includes the following elements:

(a) If the decision is not to issue a PIE, a statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute.

(b) If the decision is to issue a PIE—

(1) A reference to the NOPE;

(2) A statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute;

(3) A statement of the scope of the PIE; and

(4) A statement of the duration of the PIE.

§ 40.401 How does the Department notify employers and the public about a PIE?

(a) The Department maintains a document called the ''List of Excluded Drug and Alcohol Service Agents.'' This document may be found on the Department's web site (http://www.dot.gov/ost/dapc). You may also request a copy of the document from ODAPC.

(b) When the Director issues a PIE, he or she adds to the List the name and address of the service agent, and any other persons or organizations, to whom the PIE applies and information about the scope and duration of the PIE.

(c) When a service agent ceases to be subject to a PIE, the Director removes this information from the List.

(d) The Department also publishes a **Federal Register** notice to inform the public on any occasion on which a service agent is added to or taken off the List.

§ 40.403 Must a service agent notify its clients when the Department issues a PIE?

(a) As a service agent, if the Department issues a PIE concerning you, you must notify each of your DOT-regulated employer clients, in writing, about the issuance, scope, duration, and effect of the PIE. You may meet this requirement by sending a copy of the Director's PIE decision or by a separate notice. You must send this notice to each client within three working days of receiving from the Department the notice provided for in § 40.399(b).

(b) As part of the notice you send under paragraph (a) of this section, you must offer to transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it.

§ 40.405 May the Federal courts review PIE decisions?

The Director's decision is a final administrative action of the Department. Like all final administrative actions of Federal agencies, the Director's decision is subject to judicial review under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

§ 40.407 May a service agent ask to have a PIE reduced or terminated?

(a) Yes, as a service agent concerning whom the Department has issued a PIE, you may request that the Director terminate a PIE or reduce its duration and/or scope. This process is limited to the issues of duration and scope. It is not an appeal or reconsideration of the decision to issue the PIE.

(b) Your request must be in writing and supported with documentation.

(c) You must wait at least nine months from the date on which the Director issued the PIE to make this request.

(d) The initiating official who was the proponent of the PIE may provide information and arguments concerning your request to the Director.

(e) If the Director verifies that the sources of your noncompliance have been eliminated and that all drug or alcohol testing-related services you would provide to DOT-regulated employers will be consistent with the requirements of this part, the Director may issue a notice terminating or reducing the PIE.

§ 40.409 What does the issuance of a PIE mean to transportation employers?

(a) As an employer, you are deemed to have notice of the issuance of a PIE when it appears on the List mentioned in § 40.401(a) or the notice of the PIE appears in the **Federal Register** as provided in § 40.401(d). You should check this List to ensure that any service agents you are using or planning to use are not subject to a PIE.

(b) As an employer who is using a service agent concerning whom a PIE is issued, you must stop using the services of the service agent no later than 90 days after the Department has published the decision in the **Federal Register** or posted it on its web site. You may apply to the ODAPC Director for an extension of 30 days if you demonstrate that you cannot find a substitute service agent within 90 days.

(c) Except during the period provided in paragraph (b) of this section, you must not, as an employer, use the services of a service agent that are covered by a PIE that the Director has issued under this subpart. If you do so, you are in violation of the Department's regulations and subject to applicable DOT agency sanctions (*e.g.,* civil penalties, withholding of Federal financial assistance).

(d) You also must not obtain drug or alcohol testing services through a contractor or affiliate of the service agent to whom the PIE applies.

Example to Paragraph (d). Service Agent R was subject to a PIE with respect to SAP services. As an employer, not only must you not use R's own SAP services, but you also must not use SAP services you arrange through R, such as services provided by a subcontractor or affiliate of R or a person or organization that receives financial gain from its relationship with R.

(e) This section's prohibition on using the services of a service agent concerning which the Director has issued a PIE applies to employers in all industries subject to DOT drug and alcohol testing regulations.

Example to Paragraph (e). The initiating official for a PIE was the FAA drug and alcohol program manager, and the conduct forming the basis of the PIE pertained to the aviation industry. As a motor carrier, transit authority, pipeline, railroad, or maritime employer, you are also prohibited from using the services of the service agent involved in connection with the DOT drug and alcohol testing program.

(f) The issuance of a PIE does not result in the cancellation of drug or alcohol tests conducted using the service agent involved before the

issuance of the Director's decision or up to 90 days following its publication in the **Federal Register** or posting on the Department's web site, unless otherwise specified in the Director's PIE decision or the Director grants an extension as provided in paragraph (b) of this section.

Example to Paragraph (f). The Department issues a PIE concerning Service Agent N on September 1. All tests conducted using N's services before September 1, and through November 30, are valid for all purposes under DOT drug and alcohol testing regulations, assuming they meet all other regulatory requirements.

§ 40.411 What is the role of the DOT Inspector General's office?

(a) Any person may bring concerns about waste, fraud, or abuse on the part of a service agent to the attention of the DOT Office of Inspector General.

(b) In appropriate cases, the Office of Inspector General may pursue criminal or civil remedies against a service agent.

(c) The Office of Inspector General may provide factual information to other DOT officials for use in a PIE proceeding.

§ 40.413 How are notices sent to service agents?

(a) If you are a service agent, DOT sends notices to you, including correction notices, notices of proposed exclusion, decision notices, and other notices, in any of the ways mentioned in paragraph (b) or (c) of this section.

(b) DOT may send a notice to you, your identified counsel, your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers to the last known street address, fax number, or e-mail address. DOT deems the notice to have been received by you if sent to any of these persons.

(c) DOT considers notices to be received by you—

(1) When delivered, if DOT mails the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if DOT sends the notice by fax or five days after we send it if the fax is undeliverable; or

(3) When delivered, if DOT sends the notice by e-mail or five days after DOT sends it if the e-mail is undeliverable.

2. Effective August 1, 2001, revise 49 CFR Part 40 to read as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

Subpart A—Administrative Provisions

Sec.

Subpart B—Employer Responsibilities

Subpart C—Urine Collection Personnel

Subpart D—Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections

Subpart E—Urine Specimen Collections

Subpart F—Drug Testing Laboratories

Subpart G—Medical Review Officers and the Verification Process

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*

Subpart A—Administrative Provisions

§ 40.1 Who does this regulation cover?

(a) This part tells all parties who conduct drug and alcohol tests required by Department of Transportation (DOT) agency regulations how to conduct these tests and what procedures to use.

(b) This part concerns the activities of transportation employers, safety-sensitive transportation employees (including self-employed individuals, contractors and volunteers as covered by DOT agency regulations), and service agents.

(c) Nothing in this part is intended to supersede or conflict with the implementation of the Federal Railroad Administration's post-accident testing program (see 49 CFR 219.200).

§ 40.3 What do the terms used in this regulation mean?

In this part, the terms listed in this section have the following meanings:

Adulterated specimen. A specimen that contains a substance that is not expected to be present in human urine, or contains a substance expected to be present but is at a concentration so high that it is not consistent with human urine.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to: interlocking management or ownership; shared interest among family members; shared facilities or equipment; or common use of employees. Following the issuance of a public interest exclusion, an organization having the same or similar management, ownership, or principal employees as the service agent concerning whom a public interest exclusion is in effect is regarded as an affiliate. This definition is used in connection with the public interest exclusion procedures of Subpart R of this part.

Air blank. In evidential breath testing devices (EBTs) using gas chromatography technology, a reading of the device's internal standard. In all other EBTs, a reading of ambient air containing no alcohol.

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

Alcohol confirmation test. A subsequent test using an EBT, following a screening test with a result of 0.02 or greater, that provides quantitative data about the alcohol concentration.

Alcohol screening device (ASD). A breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and placed on a conforming products list (CPL) for such devices.

Alcohol screening test. An analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Alcohol testing site. A place selected by the employer where employees present themselves for the purpose of providing breath or saliva for an alcohol test.

Alcohol use. The drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Blind specimen or blind performance test specimen. A specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from an employee specimen.

Breath Alcohol Technician (BAT). A person who instructs and assists employees in the alcohol testing process and operates an evidential breath testing device.

Cancelled test. A drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which this part otherwise requires to be cancelled. A cancelled test is neither a positive nor a negative test.

Chain of custody. The procedure used to document the handling of the urine specimen from the time the employee gives the specimen to the collector until the specimen is destroyed. This

procedure uses the Federal Drug Testing Custody and Control Form (CCF).

Collection container. A container into which the employee urinates to provide the specimen for a drug test.

Collection site. A place selected by the employer where employees present themselves for the purpose of providing a urine specimen for a drug test.

Collector. A person who instructs and assists employees at a collection site, who receives and makes an initial inspection of the specimen provided by those employees, and who initiates and completes the CCF.

Confirmation (or confirmatory) drug test. A second analytical procedure performed on a urine specimen to identify and quantify the presence of a specific drug or drug metabolite.

Confirmation (or confirmatory) validity test. A second test performed on a urine specimen to further support a validity test result.

Confirmed drug test. A confirmation test result received by an MRO from a laboratory.

Consortium/Third-party administrator (C/TPA). A service agent that provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members. C/TPAs are not ''employers'' for purposes of this part.

Continuing education. Training for medical review officers (MROs) and substance abuse professionals (SAPs) who have completed qualification training and are performing MRO or SAP functions, designed to keep MROs and SAPs current on changes and developments in the DOT drug and alcohol testing program.

Designated employer representative (DER). An employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties and to make required decisions in the testing and evaluation processes. The DER also receives test results and other communications for the employer, consistent with the requirements of this part. Service agents cannot act as DERs.

Dilute specimen. A specimen with creatinine and specific gravity values that are lower than expected for human urine.

DOT, The Department, DOT agency. These terms encompass all DOT agencies, including, but not limited to, the United States Coast Guard (USCG), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Research and Special Programs Administration (RSPA), and the Office of the Secretary (OST). These terms include any designee of a DOT agency.

Drugs. The drugs for which tests are required under this part and DOT agency regulations are marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates.

Employee. Any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to pre-employment testing. For purposes of drug testing under this part, the term employee has the same meaning as the term ''donor'' as found on CCF and related guidance materials produced by the Department of Health and Human Services.

Employer. A person or entity employing one or more employees (including an individual who is self-employed) subject to DOT agency regulations requiring compliance with this part. The term includes an employer's officers, representatives, and management personnel. Service agents are not employers for the purposes of this part.

Error Correction Training. Training provided to BATs, collectors, and screening test technicians (STTs) following an error that resulted in the cancellation of a drug or alcohol test. Error correction training must be provided in person or by a means that provides real-time observation and interaction between the instructor and trainee.

Evidential Breath Testing Device (EBT). A device approved by NHTSA for the evidential testing of breath at the .02 and .04 alcohol concentrations, placed on NHTSA's Conforming Products List (CPL) for ''Evidential Breath Measurement Devices'' and identified on the CPL as conforming with the model specifications available from NHTSA's Traffic Safety Program.

HHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

Initial drug test. The test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.

Initial validity test. The first test used to determine if a specimen is adulterated, diluted, or substituted.

Laboratory. Any U.S. laboratory certified by HHS under the National Laboratory Certification Program as meeting the minimum standards of Subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs; or, in the case of foreign laboratories, a laboratory approved for participation by DOT under this part. (The HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs are available on the internet at *http://www.health.org/workpl.htm* or from the Division of Workplace Programs, 5600 Fishers Lane, Rockwall II Building, Suite 815, Rockville, MD 20857.)

Medical Review Officer (MRO). A person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

Office of Drug and Alcohol Policy and Compliance (ODAPC). The office in the Office of the Secretary, DOT, that is responsible for coordinating drug and alcohol testing program matters within the Department and providing information concerning the implementation of this part.

Primary specimen. In drug testing, the urine specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug metabolite in his or her system; and for the purpose of validity testing. The primary specimen is distinguished from the split specimen, defined in this section.

Qualification Training. The training required in order for a collector, BAT, MRO, SAP, or STT to be qualified to perform their functions in the DOT drug and alcohol testing program. Qualification training may be provided by any appropriate means (*e.g.,* classroom instruction, internet application, CD–ROM, video).

Refresher Training. The training required periodically for qualified collectors, BATs, and STTs to review basic requirements and provide instruction concerning changes in technology (*e.g.,* new testing methods that may be authorized) and amendments, interpretations, guidance, and issues concerning this part and DOT agency drug and alcohol testing regulations. Refresher training can be provided by any appropriate means (*e.g.,* classroom instruction, internet application, CD–ROM, video).

Screening Test Technician (STT). A person who instructs and assists

employees in the alcohol testing process and operates an ASD.

Secretary. The Secretary of Transportation or the Secretary's designee.

Service agent. Any person or entity, other than an employee of the employer, who provides services specified under this part to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of this part. Service agents are not employers for purposes of this part.

Shipping container. A container that is used for transporting and protecting urine specimen bottles and associated documents from the collection site to the laboratory.

Specimen bottle. The bottle that, after being sealed and labeled according to the procedures in this part, is used to hold the urine specimen during transportation to the laboratory.

Split specimen. In drug testing, a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result.

Stand-down. The practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

Substance Abuse Professional (SAP). A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Substituted specimen. A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine.

Verified test. A drug test result or validity testing result from an HHS-certified laboratory that has undergone review and final determination by the MRO.

§ 40.5 Who issues authoritative interpretations of this regulation?

ODAPC and the DOT Office of General Counsel (OGC) provide written interpretations of the provisions of this part. These written DOT interpretations are the only official and authoritative interpretations concerning the provisions of this part. DOT agencies may incorporate ODAPC/OGC interpretations in written guidance they issue concerning drug and alcohol testing matters. Only Part 40 interpretations issued after August 1, 2001, are considered valid.

§ 40.7 How can you get an exemption from a requirement in this regulation?

(a) If you want an exemption from any provision of this part, you must request it in writing from the Office of the Secretary of Transportation, under the provisions and standards of 49 CFR part 5. You must send requests for an exemption to the following address: Department of Transportation, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., Room 10424, Washington, DC 20590.

(b) Under the standards of 49 CFR part 5, we will grant the request only if the request documents special or exceptional circumstances, not likely to be generally applicable and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impracticable.

(c) If we grant you an exemption, you must agree to take steps we specify to comply with the intent of the provision from which an exemption is granted.

(d) We will issue written responses to all exemption requests.

Subpart B—Employer Responsibilities

§ 40.11 What are the general responsibilities of employers under this regulation?

(a) As an employer, you are responsible for meeting all applicable requirements and procedures of this part.

(b) You are responsible for all actions of your officials, representatives, and agents (including service agents) in carrying out the requirements of the DOT agency regulations.

(c) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug and alcohol testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

§ 40.13 How do DOT drug and alcohol tests relate to non-DOT tests?

(a) DOT tests must be completely separate from non-DOT tests in all respects.

(b) DOT tests must take priority and must be conducted and completed before a non-DOT test is begun. For example, you must discard any excess urine left over from a DOT test and collect a separate void for the subsequent non-DOT test.

(c) Except as provided in paragraph (d) of this section, you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations. For example, you may not test a DOT urine specimen for additional drugs, and a laboratory is prohibited from making a DOT urine specimen available for a DNA test or other types of specimen identity testing.

(d) The single exception to paragraph (c) of this section is when a DOT drug test collection is conducted as part of a physical examination required by DOT agency regulations. It is permissible to conduct required medical tests related to this physical examination (*e.g.,* for glucose) on any urine remaining in the collection container after the drug test urine specimens have been sealed into the specimen bottles.

(e) No one is permitted to change or disregard the results of DOT tests based on the results of non-DOT tests. For example, as an employer you must not disregard a verified positive DOT drug test result because the employee presents a negative test result from a blood or urine specimen collected by the employee's physician or a DNA test result purporting to question the identity of the DOT specimen.

(f) As an employer, you must not use the CCF or the ATF in your non-DOT drug and alcohol testing programs. This prohibition includes the use of the DOT forms with references to DOT programs and agencies crossed out. You also must always use the CCF and ATF for all your DOT-mandated drug and alcohol tests.

§ 40.15 May an employer use a service agent to meet DOT drug and alcohol testing requirements?

(a) As an employer, you may use a service agent to perform the tasks needed to comply with this part and DOT agency drug and alcohol testing regulations, consistent with the requirements of Subpart Q and other applicable provisions of this part.

(b) As an employer, you are responsible for ensuring that the service agents you use meet the qualifications set forth in this part (*e.g.,* § 40.121 for MROs). You may require service agents

to show you documentation that they meet the requirements of this part (*e.g.,* documentation of MRO qualifications required by § 40.121(e)).

(c) You remain responsible for compliance with all applicable requirements of this part and other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations because a service agent has not provided services as our rules require, a DOT agency can subject you to sanctions. Your good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which your alleged noncompliance with this part or a DOT agency drug and alcohol regulation may have resulted from the service agent's conduct.

(d) As an employer, you must not permit a service agent to act as your DER.

§ 40.17 Is an employer responsible for obtaining information from its service agents?

Yes, as an employer, you are responsible for obtaining information required by this part from your service agents. This is true whether or not you choose to use a C/TPA as an intermediary in transmitting information to you. For example, suppose an applicant for a safety-sensitive job takes a pre-employment drug test, but there is a significant delay in your receipt of the test result from an MRO or C/TPA. You must not assume that ''no news is good news'' and permit the applicant to perform safety-sensitive duties before receiving the result. This is a violation of the Department's regulations.

§ 40.19 [Reserved]

§ 40.21 May an employer stand down an employee before the MRO has completed the verification process?

(a) As an employer, you are prohibited from standing employees down, except consistent with a waiver a DOT agency grants under this section.

(b) You may make a request to the concerned DOT agency for a waiver from the prohibition of paragraph (a) of this section. Such a waiver, if granted, permits you to stand an employee down following the MRO's receipt of a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test pertaining to the employee.

(1) For this purpose, the concerned DOT agency is the one whose drug and alcohol testing rules apply to the majority of the covered employees in your organization. The concerned DOT agency uses its applicable procedures for considering requests for waivers.

(2) Before taking action on a waiver request, the concerned DOT agency coordinates with other DOT agencies that regulate the employer's other covered employees.

(3) The concerned DOT agency provides a written response to each employer that petitions for a waiver, setting forth the reasons for the agency's decision on the waiver request.

(c) Your request for a waiver must include, as a minimum, the following elements:

(1) Information about your organization:

(i) Your determination that standing employees down is necessary for safety in your organization and a statement of your basis for it, including any data on safety problems or incidents that could have been prevented if a stand-down procedure had been in place;

(ii) Data showing the number of confirmed laboratory positive, adulterated, and substituted test results for your employees over the two calendar years preceding your waiver request, and the number and percentage of those test results that were verified positive, adulterated, or substituted by the MRO;

(iii) Information about the work situation of the employees subject to stand-down, including a description of the size and organization of the unit(s) in which the employees work, the process through which employees will be informed of the stand-down, whether there is an in-house MRO, and whether your organization has a medical disqualification or stand-down policy for employees in situations other than drug and alcohol testing; and

(iv) A statement of which DOT agencies regulate your employees.

(2) Your proposed written company policy concerning stand-down, which must include the following elements:

(i) Your assurance that you will distribute copies of your written policy to all employees that it covers;

(ii) Your means of ensuring that no information about the confirmed positive, adulterated, or substituted test result or the reason for the employee's temporary removal from performance of safety-sensitive functions becomes available, directly or indirectly, to anyone in your organization (or subsequently to another employer) other than the employee, the MRO and the DER;

(iii) Your means of ensuring that all covered employees in a particular job category in your organization are treated the same way with respect to stand-down;

(iv) Your means of ensuring that a covered employee will be subject to stand-down only with respect to the actual performance of safety-sensitive duties;

(v) Your means of ensuring that you will not take any action adversely affecting the employee's pay and benefits pending the completion of the MRO's verification process. This includes continuing to pay the employee during the period of the stand-down in the same way you would have paid him or her had he or she not been stood down;

(vi) Your means of ensuring that the verification process will commence no later than the time an employee is temporarily removed from the performance of safety-sensitive functions and that the period of stand-down for any employee will not exceed five days, unless you are informed in writing by the MRO that a longer period is needed to complete the verification process; and

(vii) Your means of ensuring that, in the event that the MRO verifies the test negative or cancels it—

(A) You return the employee immediately to the performance of safety-sensitive duties;

(B) The employee suffers no adverse personnel or financial consequences as a result; and

(C) You maintain no individually identifiable record that the employee had a confirmed laboratory positive, adulterated, or substituted test result (*i.e.,* you maintain a record of the test only as a negative or cancelled test).

(d) The Administrator of the concerned DOT agency, or his or her designee, may grant a waiver request only if he or she determines that, in the context of your organization, there is a high probability that the procedures you propose will effectively enhance safety and protect the interests of employees in fairness and confidentiality.

(1) The Administrator, or his or her designee, may impose any conditions he or she deems appropriate on the grant of a waiver.

(2) The Administrator, or his or her designee, may immediately suspend or revoke the waiver if he or she determines that you have failed to protect effectively the interests of employees in fairness and confidentiality, that you have failed to comply with the requirements of this section, or that you have failed to comply with any other conditions the DOT agency has attached to the waiver.

(e) You must not stand employees down in the absence of a waiver, or inconsistent with the terms of your waiver. If you do, you are in violation

of this part and DOT agency drug testing regulations, and you are subject to enforcement action by the DOT agency just as you are for other violations of this part and DOT agency rules.

§ 40.23 What actions do employers take after receiving verified test results?

(a) As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test.

(b) As an employer who receives a verified adulterated or substituted drug test result, you must consider this a refusal to test and immediately remove the employee involved from performing safety-sensitive functions. You must take this action on receiving the initial report of the verified adulterated or substituted test result. Do not wait to receive the written report or the result of a split specimen test.

(c) As an employer who receives an alcohol test result of 0.04 or higher, you must immediately remove the employee involved from performing safety-sensitive functions. If you receive an alcohol test result of 0.02—0.39, you must temporarily remove the employee involved from performing safety-sensitive functions, as provided in applicable DOT agency regulations. Do not wait to receive the written report of the result of the test.

(d) As an employer, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, you must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part.

(e) As an employer who receives a drug test result indicating that the employee's specimen was dilute, take action as provided in § 40.197.

(f) As an employer who receives a drug test result indicating that the employee's specimen was invalid and that a second collection must take place under direct observation—

(1) You must immediately direct the employee to provide a new specimen under direct observation.

(2) You must not attach consequences to the finding that the test was invalid other than collecting a new specimen under direct observation.

(3) You must not give any advance notice of this test requirement to the employee.

(4) You must instruct the collector to note on the CCF the same reason (*e.g.* random test, post-accident test) as for the original collection.

(g) As an employer who receives a cancelled test result when a negative result is required (*e.g.*, pre-employment, return-to-duty, or follow-up test), you must direct the employee to provide another specimen immediately.

(h) As an employer, you may also be required to take additional actions required by DOT agency regulations (*e.g.*, FAA rules require some positive drug tests to be reported to the Federal Air Surgeon).

(i) As an employer, you must not alter a drug or alcohol test result transmitted to you by an MRO, BAT, or C/TPA.

§ 40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?

(a) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraph (b) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (*i.e.*, a new hire, an employee transfers into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

(b) You must request the information listed in this paragraph (b) from DOT-regulated employers who have employed the employee during any period during the two years before the date of the employee's application or transfer:

(1) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(2) Verified positive drug tests;

(3) Refusals to be tested (including verified adulterated or substituted drug test results);

(4) Other violations of DOT agency drug and alcohol testing regulations; and

(5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-do-duty process (*e.g.*, an employer who did not hire an employee who tested positive on a pre-employment test), you must seek to obtain this information from the employee.

(c) The information obtained from a previous employer includes any drug or alcohol test information obtained from previous employers under this section or other applicable DOT agency regulations.

(d) If feasible, you must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, you must obtain and review the information as soon as possible. However, you must not permit the employee to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive functions, unless you have obtained or made and documented a good faith effort to obtain this information.

(e) If you obtain information that the employee has violated a DOT agency drug and alcohol regulation, you must not use the employee to perform safety-sensitive functions unless you also obtain information that the employee has subsequently complied with the return-to-duty requirements of Subpart O of this part and DOT agency drug and alcohol regulations.

(f) You must provide to each of the employers from whom you request information under paragraph (b) of this section written consent for the release of the information cited in paragraph (a) of this section.

(g) The release of information under this section must be in any written form (*e.g.*, fax, e-mail, letter) that ensures confidentiality. As the previous employer, you must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided.

(h) If you are an employer from whom information is requested under paragraph (b) of this section, you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry.

(i) As the employer requesting the information required under this section, you must maintain a written, confidential record of the information you obtain or of the good faith efforts you made to obtain the information. You must retain this information for three years from the date of the employee's first performance of safety-sensitive duties for you.

(j) As the employer, you must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to

test, you must not use the employee to perform safety-sensitive functions for you, until and unless the employee documents successful completion of the return-to-duty process (see paragraphs (b)(5) and (e) of this section).

§ 40.27 Where is other information on employer responsibilities found in this regulation?

You can find other information on the responsibilities of employers in the following sections of this part:

§ 40.3—Definition.
§ 40.35—Information about DERs that employers must provide collectors.
§ 40.45—Modifying CCFs, Use of foreign-language CCFs.
§ 40.47—Use of non-Federal forms for DOT tests or Federal CCFs for non-DOT tests.
§ 40.67—Requirements for direct observation.
§§ 40.103–40.105—Blind specimen requirements.
§ 40. 173—Responsibility to ensure test of split specimen.
§ 40.193—Action in ''shy bladder'' situations.
§ 40.197—Actions following report of a dilute specimen.
§ 40.207—Actions following a report of a cancelled drug test.
§ 40.209—Actions following and consequences of non-fatal flaws in drug tests.
§ 40.215—Information about DERs that employers must provide BATs and STTs.
§ 40.225—Modifying ATFs; use of foreign-language ATFs.
§ 40.227—Use of non-DOT forms for DOT tests or DOT ATFs for non-DOT tests.
§ 40.235 (c) and (d)—responsibility to follow instructions for ASDs.
§ 40.255 (b)—receipt and storage of alcohol test information.
§ 40.265 (c)–(e)—actions in ''shy lung'' situations.
§ 40.267—Cancellation of alcohol tests.
§ 40.271—Actions in ''correctable flaw'' situations in alcohol tests.
§ 40.273—Actions following cancelled tests in alcohol tests.
§ 40.275—Actions in ''non-fatal flaw'' situations in alcohol tests.
§§ 40.287–40.289—Responsibilities concerning SAP services.
§§ 40.295–40.297—Prohibition on seeking second SAP evaluation or changing SAP recommendation.
§ 40.303—Responsibilities concerning aftercare recommendations.
§ 40.305—Responsibilities concerning return-to-duty decision.
§ 40.309—Responsibilities concerning follow-up tests.
§ 40.321—General confidentiality requirement.
§ 40.323—Release of confidential information in litigation.
§ 40.331—Other circumstances for the release of confidential information.
§ 40.333—Record retention requirements.
§ 40.345—Choice of who reports drug testing information to employers.

Subpart C—Urine Collection Personnel

§ 40.31 Who may collect urine specimens for DOT drug testing?

(a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.

(b) A collector must meet training requirements of § 40.33.

(c) As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations.

(d) You must not act as the collector for the employee being tested if you work for a HHS-certified laboratory (*e.g.,* as a technician or accessioner) and could link the employee with a urine specimen, drug testing result, or laboratory report.

§ 40.33 What training requirements must a collector meet?

To be permitted to act as a collector in the DOT drug testing program, you must meet each of the requirements of this section:

(a) *Basic information.* You must be knowledgeable about this part, the current ''DOT Urine Specimen Collection Procedures Guidelines,'' and DOT agency regulations applicable to the employers for whom you perform collections, and you must keep current on any changes to these materials. The DOT Urine Specimen Collection Procedures Guidelines document is available from ODAPC (Department of Transportation, 400 7th Street, SW., Room 10403, Washington DC, 20590, 202–366–3784, or on the ODAPC web site (http://www.dot.gov/ost/dapc).

(b) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph. Qualification training must provide instruction on the following subjects:

(1) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;

(2) ''Problem'' collections (*e.g.,* situations like ''shy bladder'' and attempts to tamper with a specimen);

(3) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(4) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate;

(c) *Initial Proficiency Demonstration.* Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections.

(1) The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of range scenario, and one scenario in which the employee refuses to sign the CCF and initial the specimen bottle tamper-evident seal.

(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are ''error-free.'' This person must be an individual who has demonstrated necessary knowledge, skills, and abilities by—

(i) Regularly conducting DOT drug test collections for a period of at least a year;

(ii) Conducting collector training under this part for a year; or

(iii) Successfully completing a ''train the trainer'' course.

(d) *Schedule for qualification training and initial proficiency demonstration.* The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(1) If you became a collector before August 1, 2001, and you have already met the requirements of paragraphs (b) and (c) of this section, you do not have to meet them again.

(2) If you became a collector before August 1, 2001, and have yet to meet the requirements of paragraphs (b) and (c) of this section, you must do so no later than January 31, 2003.

(3) If you become a collector on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) *Refresher training.* No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) *Error Correction Training.* If you make a mistake in the collection process that causes a test to be cancelled (*i.e.,* a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(i) Error correction training must be provided and your proficiency

documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(ii) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(iii) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were ''error-free.''

(g) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

§ 40.35 What information about the DER must employers provide to collectors?

As an employer, you must provide to collectors the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

§ 40.37 Where is other information on the role of collectors found in this regulation?

You can find other information on the role and functions of collectors in the following sections of this part:

§ 40.3—Definition.
§ 40.43—Steps to prepare and secure collection sites.
§§ 40.45–40.47—Use of CCF.
§§ 40.49–40.51—Use of collection kit and shipping materials.
§§ 40.61–40.63—Preliminary steps in collections.
§ 40.65—Role in checking specimens.
§ 40.67—Role in directly observed collections.
§ 40.69—Role in monitored collections.
§ 40.71—Role in split specimen collections.
§ 40.73—Chain of custody completion and finishing the collection process.
§ 40.103—Processing blind specimens.
§ 40.191—Action in case of refusals to take test.
§ 40.193—Action in ''shy bladder'' situations.
§ 40.199–40.205—Collector errors in tests, effects, and means of correction.

Subpart D—Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections

§ 40.41 Where does a urine collection for a DOT drug test take place?

(a) A urine collection for a DOT drug test must take place in a collection site meeting the requirements of this section.

(b) If you are operating a collection site, you must ensure that it meets the security requirements of § 40.43.

(c) If you are operating a collection site, you must have all necessary personnel, materials, equipment, facilities and supervision to provide for the collection, temporary storage, and shipping of urine specimens to a laboratory, and a suitable clean surface for writing.

(d) Your collection site must include a facility for urination described in either paragraph (e) or paragraph (f) of this section.

(e) The first, and preferred, type of facility for urination that a collection site may include is a single-toilet room, having a full-length privacy door, within which urination can occur.

(1) No one but the employee may be present in the room during the collection, except for the observer in the event of a directly observed collection.

(2) You must have a source of water for washing hands, that, if practicable, should be external to the closed room where urination occurs. If an external source is not available, you may meet this requirement by securing all sources of water and other substances that could be used for adulteration and substitution (*e.g.,* water faucets, soap dispensers) and providing moist towelettes outside the closed room.

(f) The second type of facility for urination that a collection site may include is a multistall restroom.

(1) Such a site must provide substantial visual privacy (*e.g.,* a toilet stall with a partial-length door) and meet all other applicable requirements of this section.

(2) If you use a multi-stall restroom, you must either—

(i) Secure all sources of water and other substances that could be used for adulteration and substitution (*e.g.*, water faucets, soap dispensers) and place bluing agent in all toilets or secure the toilets to prevent access; or

(ii) Conduct all collections in the facility as monitored collections (see § 40.69 for procedures). This is the only circumstance in which you may conduct a monitored collection.

(3) No one but the employee may be present in the multistall restroom during the collection, except for the monitor in the event of a monitored collection or the observer in the event of a directly observed collection.

(g) A collection site may be in a medical facility, a mobile facility (*e.g.*, a van), a dedicated collection facility, or any other location meeting the requirements of this section.

§ 40.43 What steps must operators of collection sites take to protect the security and integrity of urine collections?

(a) Collectors and operators of collection sites must take the steps listed in this section to prevent unauthorized access that could compromise the integrity of collections.

(b) As a collector, you must do the following before each collection to deter tampering with specimens:

(1) Secure any water sources or otherwise make them unavailable to employees (*e.g.*, turn off water inlet, tape handles to prevent opening faucets);

(2) Ensure that the water in the toilet is blue;

(3) Ensure that no soap, disinfectants, cleaning agents, or other possible adulterants are present;

(4) Inspect the site to ensure that no foreign or unauthorized substances are present;

(5) Tape or otherwise secure shut any movable toilet tank top, or put bluing in the tank;

(6) Ensure that undetected access (*e.g.*, through a door not in your view) is not possible;

(7) Secure areas and items (*e.g.*, ledges, trash receptacles, paper towel holders, under-sink areas) that appear suitable for concealing contaminants; and

(8) Recheck items in paragraphs (b)(1) through (7) of this section following each collection to ensure the site's continued integrity.

(c) If the collection site uses a facility normally used for other purposes, like a public rest room or hospital examining room, you must, as a collector, also ensure before the collection that:

(1) Access to collection materials and specimens is effectively restricted; and

(2) The facility is secured against access during the procedure to ensure privacy to the employee and prevent distraction of the collector. Limited-access signs must be posted.

(d) As a collector, you must take the following additional steps to ensure security during the collection process:

(1) To avoid distraction that could compromise security, you are limited to conducting a collection for only one employee at a time. However, during the time one employee is in the period for drinking fluids in a ''shy bladder''

situation (see § 40.193(b)), you may conduct a collection for another employee.

(2) To the greatest extent you can, keep an employee's collection container within view of both you and the employee between the time the employee has urinated and the specimen is sealed.

(3) Ensure you are the only person in addition to the employee who handles the specimen before it is poured into the bottles and sealed with tamper-evident seals.

(4) In the time between when the employee gives you the specimen and when you seal the specimen, remain within the collection site.

(5) Maintain personal control over each specimen and CCF throughout the collection process.

(e) If you are operating a collection site, you must implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which urine specimens are collected or stored.

(1) Only employees being tested, collectors and other collection site workers, DERs, employee and employer representatives authorized by the employer (*e.g.*, employer policy, collective bargaining agreement), and DOT agency representatives are authorized persons for purposes of this paragraph (e).

(2) Except for the observer in a directly observed collection or the monitor in the case of a monitored collection, you must not permit anyone to enter the urination facility in which employees provide specimens.

(3) You must ensure that all authorized persons are under the supervision of a collector at all times when permitted into the site.

(4) You or the collector may remove any person who obstructs, interferes with, or causes a delay in the collection process.

(f) If you are operating a collection site, you must minimize the number of persons handling specimens.

§ 40.45 What form is used to document a DOT urine collection?

(a) The Federal Drug Testing Custody and Control Form (CCF) must be used to document every urine collection required by the DOT drug testing program. The CCF must be a five-part carbonless manifold form. You may view this form on the Department's web site (http://www.dot.gov/ost/dapc) or the HHS web site (http://www.health.org/workpl.htm).

(b) As a participant in the DOT drug testing program, you are not permitted to modify or revise the CCF except as follows:

(1) You may include, in the area outside the border of the form, other information needed for billing or other purposes necessary to the collection process.

(2) The CCF must include the names, addresses, telephone numbers and fax numbers of the employer and the MRO, which may be preprinted, typed, or handwritten. The MRO information must include the specific physician's name and address, as opposed to only a generic clinic, health care organization, or company name. This information is required, and it is prohibited for an employer, collector, service agent or any other party to omit it. In addition, a C/TPA's name, address, fax number, and telephone number may be included, but is not required.

(3) As an employer, you may add the name of the DOT agency under whose authority the test occurred as part of the employer information.

(4) As a collector, you may use a CCF with your name, address, telephone number, and fax number preprinted, but under no circumstances may you sign the form before the collection event.

(c) Under no circumstances may the CCF transmit personal identifying information about an employee (other than a social security number (SSN) or other employee identification (ID) number) to a laboratory.

(d) As an employer, you may use an equivalent foreign-language version of the CCF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and collector understand and can use the form in that language.

§ 40.47 May employers use the CCF for non-DOT collections or non-Federal forms for DOT collections?

(a) No, as an employer, you are prohibited from using the CCF for non-DOT urine collections. You are also prohibited from using non-Federal forms for DOT urine collections. Doing either subjects you to enforcement action under DOT agency regulations.

(b) (1) In the rare case where the collector, either by mistake or as the only means to conduct a test under difficult circumstances (*e.g.*, post-accident or reasonable suspicion test with insufficient time to obtain the CCF), uses a non-Federal form for a DOT collection, the use of a non-Federal form does not present a reason for the laboratory to reject the specimen for testing or for an MRO to cancel the result.

(2) The use of the non-DOT form is a ''correctable flaw.'' As an MRO, to correct the problem you must follow the procedures of § 40.205(b)(2).

§ 40.49 What materials are used to collect urine specimens?

For each DOT drug test, you must use a collection kit meeting the requirements of Appendix A of this part.

§ 40.51 What materials are used to send urine specimens to the laboratory?

(a) Except as provided in paragraph (b) of this section, you must use a shipping container that adequately protects the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory.

(b) You are not required to use a shipping container if a laboratory courier hand-delivers the specimens from the collection site to the laboratory.

Subpart E—Urine Specimen Collections

§ 40.61 What are the preliminary steps in the collection process?

As the collector, you must take the following steps before actually beginning a collection:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's work site, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test (see § 40.191(a)(1)).

(b) Ensure that, when the employee enters the collection site, you begin the testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or is unable to urinate or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT alcohol test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

Example to Paragraph (b)(1): An employee enters the test site for both a drug and an alcohol test. Normally, the collector would wait until the BAT had completed the alcohol test process before beginning the drug test process. However, there are some situations in which an exception to this normal practice would be reasonable. One

such situation might be if several people were waiting for the BAT to conduct alcohol tests, but a drug testing collector in the same facility were free. Someone waiting might be able to complete a drug test without unduly delaying his or her alcohol test. Collectors and BATs should work together, however, to ensure that post-accident and reasonable suspicion alcohol tests happen as soon as possible (*e.g.*, by moving the employee to the head of the line for alcohol tests).

(2) If the employee needs medical attention (*e.g.,* an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to collect a specimen.

(3) You must not collect, by catheterization or other means, urine from an unconscious employee to conduct a drug test under this part. Nor may you catheterize a conscious employee. However, you must inform an employee who normally voids through self-catheterization that the employee is required to provide a specimen in that manner.

(4) If, as an employee, you normally void through self-catheterization, and decline to do so, this constitutes a refusal to test.

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (*e.g.,* a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name, but does not have to include your picture, address, or telephone number.

(e) Explain the basic collection procedure to the employee, including showing the employee the instructions on the back of the CCF.

(f) Direct the employee to remove outer clothing (*e.g.,* coveralls, jacket, coat, hat) that could be used to conceal items or substances that could be used to tamper with a specimen. You must also direct the employee to leave these garments and any briefcase, purse, or other personal belongings with you or in a mutually agreeable location. You must advise the employee that failure to comply with your directions constitutes a refusal to test.

(1) If the employee asks for a receipt for any belongings left with you, you must provide one.

(2) You must allow the employee to keep his or her wallet.

(3) You must not ask the employee to remove other clothing (*e.g.,* shirts, pants, dresses, underwear), to remove all clothing, or to change into a hospital or examination gown (unless the urine collection is being accomplished simultaneously with a DOT agency-authorized medical examination).

(4) You must direct the employee to empty his or her pockets and display the items in them to ensure that no items are present which could be used to adulterate the specimen. If nothing is there that can be used to adulterate a specimen, the employee can place the items back into his or her pockets. As the employee, you must allow the collector to make this observation.

(5) If, in your duties under paragraph (f)(4) of this section, you find any material that could be used to tamper with a specimen, you must:

(i) Determine if the material appears to be brought to the collection site with the intent to alter the specimen, and, if it is, conduct a directly observed collection using direct observation procedures (see § 40.67); or

(ii) Determine if the material appears to be inadvertently brought to the collection site (*e.g.,* eye drops), secure and maintain it until the collection process is completed and conduct a normal (*i.e.,* unobserved) collection.

(g) You must instruct the employee not to list medications that he or she is currently taking on the CCF. (The employee may make notes of medications on the back of the employee copy of the form for his or her own convenience, but these notes must not be transmitted to anyone else.)

§ 40.63 What steps does the collector take in the collection process before the employee provides a urine specimen?

As the collector, you must take the following steps before the employee provides the urine specimen:

(a) Complete Step 1 of the CCF.

(b) Instruct the employee to wash and dry his or her hands at this time. You must tell the employee not to wash his or her hands again until after delivering the specimen to you. You must not give the employee any further access to water or other materials that could be used to adulterate or dilute a specimen.

(c) Select, or allow the employee to select, an individually wrapped or sealed collection container from collection kit materials. Either you or the employee, with both of you present, must unwrap or break the seal of the collection container. You must not unwrap or break the seal on any specimen bottle at this time. You must not allow the employee to take anything from the collection kit into the room used for urination except the collection container.

(d) Direct the employee to go into the room used for urination, provide a specimen of at least 45 mL, not flush the toilet, and return to you with the specimen as soon as the employee has completed the void.

(1) Except in the case of an observed or a monitored collection (see §§ 40.67 and 40.69), neither you nor anyone else may go into the room with the employee.

(2) As the collector, you may set a reasonable time limit for voiding.

(e) You must pay careful attention to the employee during the entire collection process to note any conduct that clearly indicates an attempt to tamper with a specimen (*e.g.,* substitute urine in plain view or an attempt to bring into the collection site an adulterant or urine substitute). If you detect such conduct, you must require that a collection take place immediately under direct observation (see § 40.67) and note the conduct and the fact that the collection was observed in the ''Remarks'' line of the CCF (Step 2). You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

§ 40.65 What does the collector check for when the employee presents a specimen?

As a collector, you must check the following when the employee gives the collection container to you:

(a) *Sufficiency of specimen.* You must check to ensure that the specimen contains at least 45 mL of urine.

(1) If it does not, you must follow ''shy bladder'' procedures (see § 40.193(b)).

(2) When you follow ''shy bladder'' procedures, you must discard the original specimen, unless another problem (*i.e.,* temperature out of range, signs of tampering) also exists.

(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(4) You must discard any excess urine.

(b) *Temperature.* You must check the temperature of the specimen no later than four minutes after the employee has given you the specimen.

(1) The acceptable temperature range is 32–38 °C/90–100 °F.

(2) You must determine the temperature of the specimen by reading the temperature strip attached to the collection container.

(3) If the specimen temperature is within the acceptable range, you must mark the ''Yes'' box on the CCF (Step 2).

(4) If the specimen temperature is outside the acceptable range, you must mark the ''No'' box and enter in the ''Remarks'' line (Step 2) your findings about the temperature.

(5) If the specimen temperature is outside the acceptable range, you must immediately conduct a new collection using direct observation procedures (see § 40.67).

(6) In a case where a specimen is collected under direct observation because of the temperature being out of range, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but the temperature is out of range. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(7) In a case where the employee refuses to provide another specimen (see § 40.191(a)(3)) or refuses to provide another specimen under direct observation (see § 40.191(a)(4)), you must notify the DER. As soon as you have notified the DER, you must discard any specimen the employee has provided previously during the collection procedure.

(c) *Signs of tampering.* You must inspect the specimen for unusual color, presence of foreign objects or material, or other signs of tampering (*e.g.,* if you notice any unusual odor).

(1) If it is apparent from this inspection that the employee has tampered with the specimen (*e.g.,* blue dye in the specimen, excessive foaming when shaken, smell of bleach), you must immediately conduct a new collection using direct observation procedures (see § 40.67).

(2) In a case where a specimen is collected under direct observation because of showing signs of tampering, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but it shows signs of tampering. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(3) In a case where the employee refuses to provide another specimen (see § 40.191(a)(3)) or refuses to provide a specimen under direct observation (see § 40.193(a)(4)), you must notify the DER. As soon as you have notified the DER, you must discard any specimen the employee has provided previously during the collection procedure.

§ 40.67 When and how is a directly observed collection conducted?

(a) As an employer you must direct an immediate collection under direct observation with no advance notice to the employee, if:

(1) The laboratory reported to the MRO that a specimen is invalid, and the MRO reported to you that there was not an adequate medical explanation for the result; or

(2) The MRO reported to you that the original positive, adulterated, or substituted test result had to be cancelled because the test of the split specimen could not be performed.

(b) As an employer, you may direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

(c) As a collector, you must immediately conduct a collection under direct observation if:

(1) You are directed by the DER to do so (see paragraphs (a) and (c) of this section); or

(2) You observed materials brought to the collection site or the employee's conduct clearly indicates an attempt to tamper with a specimen (see §§ 40.61(f)(5)(i) and 40.63(e)); or

(3) The temperature on the original specimen was out of range (see § 40.65(b)(5)); or (4) The original specimen appeared to have been tampered with (see § 40.65(c)(1)).

(d)(1) As the employer, you must explain to the employee the reason for a directly observed collection under paragraph (a) or (b) of this section.

(2) As the collector, you must explain to the employee the reason under this part for a directly observed collection under paragraphs (c)(2) through (4) of this section.

(e) As the collector, you must complete a new CCF for the directly observed collection.

(1) You must mark the ''reason for test'' block (Step 1) the same as for the first collection.

(2) You must check the ''Observed, (Enter Remark)'' box and enter the reason (see § 40.67(b)) in the ''Remarks'' line (Step 2).

(f) In a case where two sets of specimens are being sent to the laboratory because of suspected tampering with the specimen at the collection site, enter on the ''Remarks'' line of the CCF (Step 2) for each specimen a notation to this effect (*e.g.,* collection 1 of 2, or 2 of 2) and the specimen ID number of the other specimen.

(g) As the collector, you must ensure that the observer is the same gender as the employee. You must never permit an opposite gender person to act as the observer. The observer can be a different person from the collector and need not be a qualified collector.

(h) As the collector, if someone else is to observe the collection (*e.g.,* in order to ensure a same gender observer), you must verbally instruct that person to follow procedures at paragraphs (i) and (j) of this section. If you, the collector, are the observer, you too must follow these procedures.

(i) As the observer, you must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container.

(j) As the observer but not the collector, you must not take the collection container from the employee, but you must observe the specimen as the employee takes it to the collector.

(k) As the collector, when someone else has acted as the observer, you must include the observer's name in the ''Remarks'' line of the CCF (Step 2).

(l) As the employee, if you decline to allow a directly observed collection required or permitted under this section to occur, this is a refusal to test.

§ 40.69 How is a monitored collection conducted?

(a) As the collector, you must secure the room being used for the monitored collection so that no one except the employee and the monitor can enter it until after the collection has been completed.

(b) As the collector, you must ensure that the monitor is the same gender as the employee, unless the monitor is a medical professional (*e.g.,* nurse, doctor, physician's assistant). The monitor can be a different person from the collector and need not be a qualified collector.

(c) As the collector, if someone else is to monitor the collection (*e.g.,* in order to ensure a same gender monitor), you must verbally instruct that person to follow procedures at paragraphs (d) and (e) of this section. If you, the collector, are the observer, you too must follow these procedures.

(d) As the monitor, you must not watch the employee urinate into the collection container. If you hear sounds or make other observations indicating an attempt to tamper with a specimen, there must be an additional collection under direct observation (see §§ 40.63(e), 40.65(c), and 40.67(b)).

(e) As the monitor, you must ensure that the employee takes the collection container directly to the collector as soon as the employee has exited the enclosure.

(f) As the collector, when someone else has acted as the monitor, you must note that person's name in the ''Remarks'' line of the CCF (Step 2).

(g) As the employee being tested, if you decline to permit a collection authorized under this section to be monitored, it is a refusal to test.

§ 40.71 How does the collector prepare the specimens?

(a) All collections under DOT agency drug testing regulations must be split specimen collections.

(b) As the collector, you must take the following steps, in order, after the employee brings the urine specimen to you. You must take these steps in the presence of the employee.

(1) Check the box on the CCF (Step 2) indicating that this was a split specimen collection.

(2) You, not the employee, must first pour at least 30 mL of urine from the collection container into one specimen bottle, to be used for the primary specimen.

(3) You, not the employee, must then pour at least 15 mL of urine from the collection container into the second specimen bottle to be used for the split specimen.

(4) You, not the employee, must place and secure (*i.e.,* tighten or snap) the lids/caps on the bottles.

(5) You, not the employee, must seal the bottles by placing the tamper-evident bottle seals over the bottle caps/lids and down the sides of the bottles.

(6) You, not the employee, must then write the date on the tamper-evident bottle seals.

(7) You must then ensure that the employee initials the tamper-evident bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided. If the employee fails or refuses to do so, you must note this in the ''Remarks'' line of the CCF (Step 2) and complete the collection process.

§ 40.73 How is the collection process completed?

(a) As the collector, you must do the following things to complete the collection process. You must complete the steps called for in paragraphs (a)(1) through (a)(7) of this section in the employee's presence.

(1) Direct the employee to read and sign the certification statement on Copy 2 (Step 5) of the CCF and provide date of birth, printed name, and day and evening contact telephone numbers. If the employee refuses to sign the CCF or to provide date of birth, printed name, or telephone numbers, you must note this in the ''Remarks'' line (Step 2) of the CCF, and complete the collection. If the employee refuses to fill out any information, you must, as a minimum, print the employee's name in the appropriate place.

(2) Complete the chain of custody on the CCF (Step 5) by printing your name (note: you may pre-print your name), recording the time and date of the collection, signing the statement, and entering the name of the delivery service transferring the specimen to the laboratory,

(3) Ensure that all copies of the CCF are legible and complete.

(4) Remove Copy 5 of the CCF and give it to the employee.

(5) Place the specimen bottles and Copy 1 of the CCF in the appropriate pouches of the plastic bag.

(6) Secure both pouches of the plastic bag.

(7) Advise the employee that he or she may leave the collection site.

(8) To prepare the sealed plastic bag containing the specimens and CCF for shipment you must:

(i) Place the sealed plastic bag in a shipping container (*e.g.,* standard courier box) designed to minimize the possibility of damage during shipment. (More than one sealed plastic bag can be placed into a single shipping container if you are doing multiple collections.)

(ii) Seal the container as appropriate.

(iii) If a laboratory courier hand-delivers the specimens from the collection site to the laboratory, prepare the sealed plastic bag for shipment as directed by the courier service.

(9) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must fax or otherwise transmit these copies to the MRO and DER within 24 hours or during the next business day. Keep Copy 3 for at least 30 days, unless otherwise specified by applicable DOT agency regulations.

(b) As a collector or collection site, you must ensure that each specimen you collect is shipped to a laboratory as quickly as possible, but in any case within 24 hours or during the next business day.

Subpart F—Drug Testing Laboratories

§ 40.81 What laboratories may be used for DOT drug testing?

(a) As a drug testing laboratory located in the U.S., you are permitted to participate in DOT drug testing only if you are certified by HHS under the National Laboratory Certification Program (NLCP) for all testing required under this part.

(b) As a drug testing laboratory located in Canada or Mexico which is not certified by HHS under the NLCP, you are permitted to participate in DOT drug testing only if:

(1) The DOT, based on a written recommendation from HHS, has approved your laboratory as meeting HHS laboratory certification standards or deemed your laboratory fully equivalent to a laboratory meeting HHS laboratory certification standards for all testing required under this part; or

(2) The DOT, based on a written recommendation from HHS, has recognized a Canadian or Mexican certifying organization as having equivalent laboratory certification standards and procedures to those of HHS, and the Canadian or Mexican certifying organization has certified your laboratory under those equivalent standards and procedures.

(c) As a laboratory participating in the DOT drug testing program, you must comply with the requirements of this part. You must also comply with all applicable requirements of HHS in testing DOT specimens, whether or not the HHS requirements are explicitly stated in this part.

(d) If DOT determines that you are in noncompliance with this part, you could be subject to PIE proceedings under Subpart R of this part. If the Department issues a PIE with respect to you, you are ineligible to participate in the DOT drug testing program even if you continue to meet the requirements of paragraph (a) or (b) of this section.

§ 40.83 How do laboratories process incoming specimens?

As the laboratory, you must do the following when you receive a DOT specimen:

(a) You are authorized to receive only the laboratory copy of the CCF. You are not authorized to receive other copies of the CCF nor any copies of the alcohol testing form.

(b) You must comply with applicable provisions of the HHS Guidelines concerning accessioning and processing urine drug specimens.

(c) You must inspect each specimen and CCF for the following ''fatal flaws:''

(1) The specimen ID numbers on the specimen bottle and the CCF do not match;

(2) The specimen bottle seal is broken or shows evidence of tampering, unless a split specimen can be redesignated (see paragraph (g) of this section);

(3) The collector's printed name *and* signature are omitted from the CCF; and

(4) There is an insufficient amount of urine in the primary bottle for analysis, unless the specimens can be

redesignated (see paragraph (g) of this section).

(d) When you find a specimen meeting the criteria of paragraph (c) of this section, you must document your findings and stop the testing process. Report the result in accordance with § 40.97(a)(3) .

(e) You must inspect each specimen and CCF for the following ''correctable flaws'':

(1) The specimen temperature was not checked and the ''Remarks'' line did not contain an entry regarding the temperature being outside of range; and

(2) The collector's signature is omitted on the certification statement on the CCF.

(f) Upon finding that a specimen meets the criteria of paragraph (e) of this section, document the flaw and continue the testing process.

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the flaw.

(2) You must then attempt to correct the flaw by following the procedures of § 40.205(b).

(3) If the flaw is not corrected, report the result in accordance with § 40.97(a)(3).

(g) If the CCF is marked indicating that a split specimen collection was collected and if the split specimen does not accompany the primary, has leaked, or is otherwise unavailable for testing, you must still test the primary specimen and follow appropriate procedures outlined in § 40.175(b) regarding the unavailability of the split specimen for testing.

(1) The primary specimen and the split specimen can be redesignated (*i.e.,* Bottle B is redesignated as Bottle A, and vice-versa) if:

(i) The primary specimen appears to have leaked out of its sealed bottle and the laboratory believes a sufficient amount of urine exists in the split specimen to conduct all appropriate primary laboratory testing; or

(ii) The primary specimen is labeled as Bottle B, and the split specimen as Bottle A; or

(iii) The laboratory opens the split specimen instead of the primary specimen, the primary specimen remains sealed, and the laboratory believes a sufficient amount of urine exists in the split specimen to conduct all appropriate primary laboratory testing; or

(iv) The primary specimen seal is broken but the split specimen remains sealed and the laboratory believes a sufficient amount of urine exists in the split specimen to conduct all appropriate primary laboratory testing.

(2) In situations outlined in paragraph (g)(1) of this section, the laboratory shall mark through the ''A'' and write ''B,'' then initial and date the change. A corresponding change shall be made to the other bottle by marking through the ''B'' and writing ''A,'' and initialing and dating the change.

(h) A notation shall be made on Copy 1 of the CCF (Step 5a) and on any laboratory internal chain of custody documents, as appropriate, for any fatal or correctable flaw.

§ 40.85 What drugs do laboratories test for?

As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test ''DOT specimens'' for any other drugs.

(a) Marijuana metabolites.

(b) Cocaine metabolites.

(c) Amphetamines.

(d) Opiate metabolites.

(e) Phencyclidine (PCP).

§ 40.87 What are the cutoff concentrations for initial and confirmation tests?

(a) As a laboratory, you must use the cutoff concentrations displayed in the following table for initial and confirmation drug tests. All cutoff concentrations are expressed in nanograms per milliliter (ng/mL). The table follows:

Type of drug or metabolite	Initial test	Confirmation test
(1) Marijuana metabolites	50	
(i) Delta-9-tetrahydrocanna-binol-9-carboxylic acid (THC)		15
(2) Cocaine metabolites (Benzoylecgonine)	300	150
(3) Phencyclidine (PCP)	25	25
(4) Amphetamines	1000	
(i) Amphetamine		500
(ii) Methamphetamine		500 (Specimen must also contain amphetamine at a concentration of greater than or equal to 200 ng/mL.)
(5) Opiate metabolites	2000	
(i) Codeine		2000
(ii) Morphine		2000
(iii) 6-acetylmorphine (6–AM)		10 (Test for 6–AM in the specimen. Conduct this test only when specimen contains morphine at a concentration greater than or equal to 2000 ng/mL.)

(b) On an initial drug test, you must report a result below the cutoff concentration as negative. If the result is at or above the cutoff concentration, you must conduct a confirmation test.

(c) On a confirmation drug test, you must report a result below the cutoff concentration as negative and a result at or above the cutoff concentration as confirmed positive.

(d) You must report quantitative values for morphine or codeine at 15,000 ng/mL or above.

§ 40.89 What is validity testing, and are laboratories required to conduct it?

(a) Specimen validity testing is the evaluation of the specimen to determine if it is consistent with normal human urine. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted.

(b) As a laboratory, you must conduct validity testing.

§ 40.91 What validity tests must laboratories conduct on primary specimens?

As a laboratory, when you conduct validity testing under § 40.89, you must conduct it in accordance with the requirements of this section.

(a) You must test each primary specimen for creatinine. You must also determine its specific gravity if you find that the creatinine concentration is less than 20 mg/dL.

(b) You must measure the pH of each primary specimen.

(c) You must test each primary specimen to determine if it contains

substances that may be used to adulterate the specimen. Your tests must have the capability of determining whether any substance identified in current HHS requirements or specimen validity guidance is present in the specimen.

(d) If you suspect the presence of an interfering substance/adulterant that could make a test result invalid, but you are unable to identify it (*e.g.,* a new adulterant), you must, as the first laboratory, send the specimen to another HHS certified laboratory that has the capability of doing so.

(e) If you identify a substance in a specimen that appears to be an adulterant, but which is not listed in current HHS requirements or guidance, you must report the finding in writing to ODAPC and the Division of Workplace Programs, HHS, within three business days. You must also complete testing of the specimen for drugs, to the extent technically feasible.

(f) You must conserve as much as possible of the specimen for possible future testing.

§ 40.93 What criteria do laboratories use to establish that a specimen is dilute or substituted?

(a) As a laboratory you must consider the primary specimen to be dilute if the creatinine concentration is less than 20 mg/dL and the specific gravity is less than 1.003, unless the criteria for a substituted specimen are met.

(b) As a laboratory you must consider the primary specimen to be substituted if the creatinine concentration is less than or equal to 5 mg/dL *and* the specific gravity is less than or equal to 1.001 or greater than or equal to 1.020.

§ 40.95 What criteria do laboratories use to establish that a specimen is adulterated?

(a) As a laboratory, you must consider the primary specimen to be adulterated if you determine that—

(1) A substance that is not expected to be present in human urine is identified in the specimen;

(2) A substance that is expected to be present in human urine is identified at a concentration so high that it is not consistent with human urine; or

(3) The physical characteristics of the specimen are outside the normal expected range for human urine.

(b) In making your determination under paragraph (a) of this section, you must apply the criteria in current HHS requirements or specimen validity guidance.

§ 40.97 What do laboratories report and how do they report it?

(a) As a laboratory, you must report the results for each primary specimen tested as one of the following:

(1) Negative;

(2) Negative—dilute;

(3) Rejected for testing, with remark(s);

(4) Positive, with drug(s)/metabolite(s) noted;

(5) Positive, with drug(s)/metabolite(s) noted—dilute;

(6) Adulterated, with remark(s);

(7) Substituted, with remark(s); or

(8) Invalid result, with remark(s).

(b) As a laboratory, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or a service agent (*e.g.,* C/TPA).

(1) Negative results: You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF which has been signed by the certifying scientist, or you may provide the laboratory results report electronically (*i.e.,* computer data file).

(i) If you elect to provide the laboratory results report, you must include the following elements, as a minimum, in the report format:

(A) Laboratory name;

(B) Employer's name (you may include I.D. or account number;

(C) Specimen I.D. number;

(D) Donor's SSN or employee I.D. number, if provided; '

(E) Reason for test, if provided;

(F) Date of the collection;

(G) Date received at the laboratory;

(H) Date certifying scientist released the results;

(I) Results (*e.g.,* positive, adulterated) as listed in paragraph (a) of this section; and

(J) Remarks section, with an explanation of any situation in which a correctable flaw has been corrected.

(ii) The laboratory results report may be released only after review and approval by the certifying scientist and must reflect the same test result information as contained on the CCF signed by the certifying scientist.

(iii) The results report may be transmitted through any means that ensures accuracy and confidentiality. You, as the laboratory, together with the MRO, must ensure that the information is adequately protected from unauthorized access or release, both during transmission and in storage.

(2) Non-negative results: You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF that has been signed by the certifying scientist. In addition, you may provide the electronic laboratory results report following the format and procedures set forth in paragraphs (b)(1)(i) and (ii) of this section.

(c) In transmitting laboratory results to the MRO, you, as the laboratory, together with the MRO, must ensure that the information is adequately protected from unauthorized access or release, both during transmission and in storage. If the results are provided by fax, the fax connection must have a fixed telephone number accessible only to authorized individuals.

(d) You must transmit test results to the MRO in a timely manner, preferably the same day that review by the certifying scientist is completed.

(e) You must provide quantitative values for confirmed positive drug, adulterated, and substituted test results to the MRO when the MRO requests you to do so in writing. The MRO's request may either be a general request covering all such results you send to the MRO or a specific case-by-case request.

(f) You must provide quantitative values for confirmed opiate results for morphine or codeine at 15,000 ng/mL or above, even if the MRO has not requested quantitative values for the test result.

§ 40.99 How long does the laboratory retain specimens after testing?

(a) As a laboratory testing the primary specimen, you must retain a specimen that was reported with positive, adulterated, substituted, or invalid results for a minimum of one year.

(b) You must keep such a specimen in secure, long-term, frozen storage in accordance with HHS requirements.

(c) Within the one-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain a specimen for an additional period of time (*e.g.,* for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the specimen at the end of the year.

(d) If you have not sent the split specimen to another laboratory for testing, you must retain the split specimen for an employee's test for the same period of time that you retain the primary specimen and under the same storage conditions.

(e) As the laboratory testing the split specimen, you must meet the requirements of paragraphs (a) through (d) of this section with respect to the split specimen.

§ 40.101 What relationship may a laboratory have with an MRO?

(a) As a laboratory, you may not enter into any relationship with an MRO that creates a conflict of interest or the appearance of a conflict of interest with the MRO's responsibilities for the employer. You may not derive any financial benefit by having an employer use a specific MRO.

(b) The following are examples of relationships between laboratories and MROs that the Department regards as creating conflicts of interest, or the appearance of such conflicts. This following list of examples is not intended to be exclusive or exhaustive:

(1) The laboratory employs an MRO who reviews test results produced by the laboratory;

(2) The laboratory has a contract or retainer with the MRO for the review of test results produced by the laboratory;

(3) The laboratory designates which MRO the employer is to use, gives the employer a slate of MROs from which to choose, or recommends certain MROs;

(4) The laboratory gives the employer a discount or other incentive to use a particular MRO;

(5) The laboratory has its place of business co-located with that of an MRO or MRO staff who review test results produced by the laboratory; or

(6) The laboratory permits an MRO, or an MRO's organization, to have a financial interest in the laboratory.

§ 40.103 What are the requirements for submitting blind specimens to a laboratory?

(a) As an employer or C/TPA with an aggregate of 2000 or more DOT-covered employees, you must send blind specimens to laboratories you use. If you have an aggregate of fewer than 2000 DOT-covered employees, you are not required to provide blind specimens.

(b) To each laboratory to which you send at least 100 specimens in a year, you must transmit a number of blind specimens equivalent to one percent of the specimens you send to that laboratory, up to a maximum of 50 blind specimens in each quarter (*i.e.,* January–March, April–June, July–September, October–December). As a C/TPA, you must apply this percentage to the total number of DOT-covered employees' specimens you send to the laboratory. Your blind specimen submissions must be evenly spread throughout the year. The following examples illustrate how this requirement works:

Example 1 to Paragraph (b). You send 2500 specimens to Lab X in Year 1. In this case, you would send 25 blind specimens to Lab X in Year 1. To meet the even distribution requirement, you would send 6 in each of three quarters and 7 in the other.

Example 2 to Paragraph (b). You send 2000 specimens to Lab X and 1000 specimens to Lab Y in Year 1. In this case, you would send 20 blind specimens to Lab X and 10 to Lab Y in Year 1. The even distribution requirement would apply in a similar way to that described in Example 1.

Example 3 to Paragraph (b). Same as Example 2, except that you also send 20 specimens to Lab Z. In this case, you would send blind specimens to Labs X and Y as in Example 2. You would not have to send any blind specimens to Lab Z, because you sent fewer than 100 specimens to Lab Z.

Example 4 to Paragraph (b). You are a C/TPA sending 2000 specimens to Lab X in Year 1. These 2000 specimens represent 200 small employers who have an average of 10 covered employees each. In this case you—not the individual employers—send 20 blind specimens to Lab X in Year 1, again ensuring even distribution. The individual employers you represent are not required to provide any blind specimens on their own.

Example 5 to Paragraph (b). You are a large C/TPA that sends 40,000 specimens to Lab Y in Year 1. One percent of that figure is 400. However, the 50 blind specimen per quarter ''cap'' means that you need send only 50 blind specimens per quarter, rather than the 100 per quarter you would have to send to meet the one percent rate. Your annual total would be 200, rather than 400, blind specimens.

(c) Approximately 75 percent of the specimens you submit must be blank (*i.e.,* containing no drugs, nor adulterated or substituted). Approximately 15 percent must be positive for one or more of the five drugs involved in DOT tests, and approximately 10 percent must either be adulterated with a substance cited in HHS guidance or substituted (*i.e.,* having specific gravity and creatinine meeting the criteria of § 40.93(b)).

(1) The blind specimens that you submit that contain drugs, that are adulterated with a substance cited in HHS guidance, or that are substituted must be validated as to their contents by the supplier using initial and confirmatory tests.

(2) The supplier must provide information regarding the shelf life of the blind specimens.

(3) If the blind specimen is drug positive, the concentration of drug it contains must be between 1.5 and 2 times the initial drug test cutoff concentration.

(4) If the blind specimen is adulterated with nitrite, the concentration of nitrite it contains must be between 1.5 and 2 times the initial validity test cutoff concentration.

(5) If the blind specimen is adulterated by altering pH, the pH must be less than or equal to 2, or greater than or equal to 12.

(6) If the blind specimen is substituted, the creatinine must be less than or equal to 2, and the specific gravity must be 1.000.

(d) You must ensure that each blind specimen is indistinguishable to the laboratory from a normal specimen.

(1) You must submit blind specimens to the laboratory using the same channels (*e.g.,* via a regular collection site) through which employees' specimens are sent to the laboratory.

(2) You must ensure that the collector uses a CCF, places fictional initials on the specimen bottle label/seal, indicates for the MRO on Copy 2 that the specimen is a blind specimen, and discards Copies 4 and 5 (employer and employee copies).

(3) You must ensure that all blind specimens include split specimens.

§ 40.105 What happens if the laboratory reports a result different from that expected for a blind specimen?

(a) If you are an employer, MRO, or C/TPA who submits a blind specimen, and if the result reported to the MRO is different from the result expected, you must investigate the discrepancy.

(b) If the unexpected result is a false negative, you must provide the laboratory with the expected results (obtained from the supplier of the blind specimen), and direct the laboratory to determine the reason for the discrepancy.

(c) If the unexpected result is a false positive, you must provide the laboratory with the expected results (obtained from the supplier of the blind specimen), and direct the laboratory to determine the reason for the discrepancy. You must also notify ODAPC of the discrepancy by telephone (202–366–3784) or e-mail (addresses are listed on the ODAPC web site, http://www.dot.gov/ost/dapc). ODAPC will notify HHS who will take appropriate action.

§ 40.107 Who may inspect laboratories?

As a laboratory, you must permit an inspection, with or without prior notice, by ODAPC, a DOT agency, or a DOT-regulated employer that contracts with the laboratory for drug testing under the DOT drug testing program, or the designee of such an employer.

§ 40.109 What documentation must the laboratory keep, and for how long?

(a) As a laboratory, you must retain all records pertaining to each employee urine specimen for a minimum of two years.

(b) As a laboratory, you must also keep for two years employer-specific data required in § 40.111.

(c) Within the two-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain the records for an additional period of time (*e.g.,* for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the records at the end of the two-year period.

§ 40.111 When and how must a laboratory disclose statistical summaries and other information it maintains?

(a) As a laboratory, you must transmit an aggregate statistical summary, by employer, of the data listed in Appendix B to this part to the employer on a semi-annual basis.

(1) The summary must not reveal the identity of any employee.

(2) In order to avoid sending data from which it is likely that information about an employee's test result can be readily inferred, you must not send a summary if the employer has fewer than five aggregate tests results.

(3) The summary must be sent by January 20 of each year for July 1 through December 31 of the prior year.

(4) The summary must also be sent by July 20 of each year for January 1 through June 30 of the current year.

(b) When the employer requests a summary in response to an inspection, audit, or review by a DOT agency, you must provide it unless the employer had fewer than five aggregate test results. In that case, you must send the employer a report indicating that not enough testing was conducted to warrant a summary. You may transmit the summary or report by hard copy, fax, or other electronic means.

(c) You must also release information to appropriate parties as provided in §§ 40.329 and 40.331.

§ 40.113 Where is other information concerning laboratories found in this regulation?

You can find more information concerning laboratories in several sections of this part:

§ 40.3—Definition.
§ 40.13—Prohibition on making specimens available for other purposes.
§ 40.31—Conflicts of interest concerning collectors.
§ 40.47—Laboratory rejections of test for improper form.
§ 40.125—Conflicts of interest concerning MROs.
§ 40.175—Role of first laboratory in split specimen tests.
§ 40.177—Role of second laboratory in split specimen tests (drugs).
§ 40.179—Role of second laboratory in split specimen tests (adulterants).
§ 40.181—Role of second laboratory in split specimen tests (substitution).
§§ 40.183–40.185—Transmission of split specimen test results to MRO.
§§ 40.201–40.205—Role in correcting errors.
§ 40.329—Release of information to employees.
§ 40.331—Limits on release of information.
§ 40.355—Role with respect to other service agents.

Subpart G—Medical Review Officers and the Verification Process

§ 40.121 Who is qualified to act as an MRO?

To be qualified to act as an MRO in the DOT drug testing program, you must meet each of the requirements of this section:

(a) *Credentials.* You must be a licensed physician (Doctor of Medicine or Osteopathy). If you are a licensed physician in any U.S., Canadian, or Mexican jurisdiction and meet the other requirements of this section, you are authorized to perform MRO services with respect to all covered employees, wherever they are located. For example, if you are licensed as an M.D. in one state or province in the U.S., Canada, or Mexico, you are not limited to performing MRO functions in that state or province, and you may perform MRO functions for employees in other states or provinces without becoming licensed to practice medicine in the other jurisdictions.

(b) *Basic knowledge.* You must be knowledgeable in the following areas:

(1) You must be knowledgeable about and have clinical experience in controlled substances abuse disorders, including detailed knowledge of alternative medical explanations for laboratory confirmed drug test results.

(2) You must be knowledgeable about issues relating to adulterated and substituted specimens as well as the possible medical causes of specimens having an invalid result.

(3) You must be knowledgeable about this part, the DOT MRO Guidelines, and the DOT agency regulations applicable to the employers for whom you evaluate drug test results, and you must keep current on any changes to these materials. The DOT MRO Guidelines document is available from ODAPC (Department of Transportation, 400 7th Street, SW., Room 10403, Washington, DC 20590, 202–366–3784, or on the ODAPC web site (http://*www.dot.gov/ost/dapc*)).

(c) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph (c).

(1) Qualification training must provide instruction on the following subjects:

(i) Collection procedures for urine specimens;

(ii) Chain of custody, reporting, and recordkeeping;

(iii) Interpretation of drug and validity tests results;

(iv) The role and responsibilities of the MRO in the DOT drug testing program;

(v) The interaction with other participants in the program (*e.g.,* DERs, SAPs); and

(vi) Provisions of this part and DOT agency rules applying to employers for whom you review test results, including changes and updates to this part and DOT agency rules, guidance, interpretations, and policies affecting the performance of MRO functions, as well as issues that MROs confront in carrying out their duties under this part and DOT agency rules.

(2) Following your completion of qualification training under paragraph (c)(1) of this section, you must satisfactorily complete an examination administered by a nationally-recognized MRO certification board or subspecialty board for medical practitioners in the field of medical review of DOT-mandated drug tests. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(3) The following is the schedule for qualification training you must meet:

(i) If you became an MRO before August 1, 2001, and have already met the qualification training requirement, you do not have to meet it again.

(ii) If you became an MRO before August 1, 2001, but have not yet met the qualification training requirement, you must do so no later than January 31, 2003.

(iii) If you become an MRO on or after August 1, 2001, you must meet the qualification training requirement before you begin to perform MRO functions.

(d) *Continuing Education.* During each three-year period from the date on which you satisfactorily complete the examination under paragraph (c)(2) of this section, you must complete continuing education consisting of at least 12 professional development hours (*e.g.,* Continuing Education Medical Units) relevant to performing MRO functions.

(1) This continuing education must include material concerning new technologies, interpretations, recent guidance, rule changes, and other information about developments in MRO practice, pertaining to the DOT program, since the time you met the qualification training requirements of this section.

(2) Your continuing education activities must include assessment tools to assist you in determining whether you have adequately learned the material.

(e) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

§ 40.123 What are the MRO's responsibilities in the DOT drug testing program?

As an MRO, you have the following basic responsibilities:

(a) Acting as an independent and impartial ''gatekeeper'' and advocate for the accuracy and integrity of the drug testing process.

(b) Providing a quality assurance review of the drug testing process for the specimens under your purview. This includes, but is not limited to:

(1) Ensuring the review of the CCF on all specimen collections for the purposes of determining whether there is a problem that may cause a test to be cancelled (see §§ 40.199–40.203). As an MRO, you are not required to review laboratory internal chain of custody documentation. No one is permitted to cancel a test because you have not reviewed this documentation;

(2) Providing feedback to employers, collection sites and laboratories regarding performance issues where necessary; and

(3) Reporting to and consulting with the ODAPC or a relevant DOT agency when you wish DOT assistance in resolving any program issue. As an employer or service agent, you are prohibited from limiting or attempting to limit the MRO's access to DOT for this purpose and from retaliating in any way against an MRO for discussing drug testing issues with DOT.

(c) You must determine whether there is a legitimate medical explanation for confirmed positive, adulterated, substituted, and invalid drug tests results from the laboratory.

(d) While you provide medical review of employees' test results, this part does not deem that you have established a doctor-patient relationship with the employees whose tests you review.

(e) You must act to investigate and correct problems where possible and notify appropriate parties (*e.g.,* HHS, DOT, employers, service agents) where assistance is needed, (*e.g.,* cancelled or problematic tests, incorrect results, problems with blind specimens).

(f) You must ensure the timely flow of test results and other information to employers.

(g) You must protect the confidentiality of the drug testing information.

(h) You must perform all your functions in compliance with this part and other DOT agency regulations.

§ 40.125 What relationship may an MRO have with a laboratory?

As an MRO, you may not enter into any relationship with an employer's laboratory that creates a conflict of interest or the appearance of a conflict of interest with your responsibilities to that employer. You may not derive any financial benefit by having an employer use a specific laboratory. For examples of relationships between laboratories and MROs that the Department views as creating a conflict of interest or the appearance of such a conflict, see § 40.101(b).

§ 40.127 What are the MRO's functions in reviewing negative test results?

As the MRO, you must do the following with respect to negative drug test results you receive from a laboratory, prior to verifying the result and releasing it to the DER:

(a) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to initiate corrective action or to cancel the test (see §§ 40.199 and 40.203).

(b) Review the negative laboratory test result and ensure that it is consistent with the information contained on the CCF.

(c) Before you report a negative test result, you must have in your possession the following documents:

(1) Copy 2 of the CCF, a legible copy of it, or any other CCF copy containing the employee's signature; and

(2) A legible copy (fax, photocopy, image) of Copy 1 of the CCF or the electronic laboratory results report that conveys the negative laboratory test result.

(d) If the copy of the documentation provided to you by the collector or laboratory appears unclear, you must request that the collector or laboratory send you a legible copy.

(e) On Copy 2 of the CCF, place a check mark in the ''Negative'' box (Step 6), provide your name, and sign, initial, or stamp and date the verification statement.

(f) Report the result in a confidential manner (see §§ 40.163–40.167).

(g) Staff under your direct, personal supervision may the administrative functions of this section for you, but only you can cancel a test.

(1) On specimen results that are reviewed by your staff, you are responsible for assuring the quality of their work.

(2) You are required to personally review at least 5 percent of all CCFs reviewed by your staff on a quarterly basis, including all results that required a corrective action. However, you need not review more than 500 negative results in any quarter.

(3) Your review must, as a minimum, include the CCF, negative laboratory test result, any accompanying corrective documents, and the report sent to the employer. You must correct any errors that you discover. You must take action as necessary to ensure compliance by your staff with this part and document your corrective action. You must attest to the quality assurance review by initialing the CCFs that you review.

(4) You must make these CCFs easily identifiable and retrievable by you for review by DOT agencies.

§ 40.129 What are the MRO's functions in reviewing laboratory confirmed positive, adulterated, substituted, or invalid drug test results?

(a) As the MRO, you must do the following with respect to confirmed positive, adulterated, substituted, or invalid drug tests you receive from a laboratory, before you verify the result and release it to the DER:

(1) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to cancel the test (see §§ 40.199 and 40.203). Staff under your direct, personal supervision may conduct this administrative review for you, but only you may verify or cancel a test.

(2) Review Copy 1 of the CCF and ensure that it is consistent with the information contained on Copy 2, that the test result is legible, and that the certifying scientist signed the form. You are not required to review any other documentation generated by the laboratory during their analysis or handling of the specimen (*e.g.,* the laboratory internal chain of custody).

(3) If the copy of the documentation provided to you by the collector or laboratory appears unclear, you must request that the collector or laboratory send you a legible copy.

(4) Except in the circumstances spelled out in § 40.133 , conduct a verification interview. This interview must include direct contact in person or by telephone between you and the employee. You may initiate the verification process based on the laboratory results report.

(5) Verify the test result as either negative, positive, test cancelled, or

refusal to test because of adulteration or substitution, consistent with the requirements of §§ 40.135–40.145 and 40.159 .

(b) Before you report a verified negative, positive, test cancelled, refusal to test because of adulteration or substitution, you must have in your possession the following documents:

(1) Copy 2 of the CCF, a legible copy of it, or any other CCF copy containing the employee's signature; and

(2) A legible copy (fax, photocopy, image) of Copy 1 of the CCF, containing the certifying scientist's signature.

(c) With respect to verified positive test results, place a check mark in the ''Positive'' box (Step 6) on Copy 2 of the CCF, indicate the drug(s)/ metabolite(s) detected on the ''Remarks'' line, sign and date the verification statement.

(d) Report the result in a confidential manner (see §§ 40.163–40.167).

(e) With respect to adulteration or substitution test results, check the ''refusal to test because:'' box (Step 6) on Copy 2 of the CCF, check the ''Adulterated'' or ''Substituted'' box, as appropriate, make appropriate annotation in the ''Remarks'' line, sign and date the verification statement.

(f) As the MRO, your actions concerning reporting confirmed positive, adulterated, or substituted results to the employer before you have completed the verification process are also governed by the stand-down provisions of § 40.21 .

(1) If an employer has a stand-down policy that meets the requirements of § 40.21 , you may report to the DER that you have received an employee's laboratory confirmed positive, adulterated, or substituted test result, consistent with the terms of the waiver the employer received. You must not provide any further details about the test result (*e.g.,* the name of the drug involved).

(2) If the employer does not have a stand-down policy that meets the requirements of § 40.21 , you must not inform the employer that you have received an employee's laboratory confirmed positive, adulterated, or substituted test result until you verify the test result. For example, as an MRO employed directly by a company, you must not tell anyone on the company's staff or management that you have received an employee's laboratory confirmed test result.

§ 40.131 How does the MRO or DER notify an employee of the verification process after a confirmed positive, adulterated, substituted, or invalid test result?

(a) When, as the MRO, you receive a confirmed positive, adulterated, substituted, or invalid test result from the laboratory, you must contact the employee directly (*i.e.,* actually talk to the employee), on a confidential basis, to determine whether the employee wants to discuss the test result. In making this contact, you must explain to the employee that, if he or she declines to discuss the result, you will verify the test as positive or as a refusal to test because of adulteration or substitution, as applicable.

(b) As the MRO, staff under your personal supervision may conduct this initial contact for you.

(1) This staff contact must be limited to scheduling the discussion between you and the employee and explaining the consequences of the employee's declining to speak with you (*i.e.,* that the MRO will verify the test without input from the employee). If the employee declines to speak with you, the staff person must document the employee's decision, including the date and time.

(2) A staff person must not gather any medical information or information concerning possible explanations for the test result.

(3) A staff person may advise an employee to have medical information (*e.g.,* prescriptions, information forming the basis of a legitimate medical explanation for a confirmed positive test result) ready to present at the interview with the MRO.

(4) Since you are required to speak personally with the employee, face-to-face or on the phone, your staff must not inquire if the employee wishes to speak with you.

(c) As the MRO, you or your staff must make reasonable efforts to reach the employee at the day and evening telephone numbers listed on the CCF. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF. If you or your staff cannot reach the employee directly after making these efforts, you or your staff must take the following steps:

(1) Document the efforts you made to contact the employee, including dates and times. If both phone numbers are incorrect (*e.g.,* disconnected, wrong number), you may take the actions listed in paragraph (c)(2) of this section without waiting the full 24-hour period.

(2) Contact the DER, instructing the DER to contact the employee.

(i) You must simply direct the DER to inform the employee to contact you.

(ii) You must not inform the DER that the employee has a confirmed positive, adulterated, substituted, or invalid test result.

(iii) You must document the dates and times of your attempts to contact the DER, and you must document the name of the DER you contacted and the date and time of the contact.

(d) As the DER, you must attempt to contact the employee immediately, using procedures that protect, as much as possible, the confidentiality of the MRO's request that the employee contact the MRO. If you successfully contact the employee (*i.e.,* actually talk to the employee), you must document the date and time of the contact, and inform the MRO. You must inform the employee that he or she must contact the MRO within the next 72 hours and tell the employee the consequences of failing to do so (see § 40.133(a)(2)).

(1) As the DER, you must not inform anyone else working for the employer that you are seeking to contact the employee on behalf of the MRO.

(2) If, as the DER, you have made all reasonable efforts to contact the employee but failed to do so, you may place the employee on temporary medically unqualified status or medical leave. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF.

(i) As the DER, you must document the dates and times of these efforts.

(ii) If, as the DER, you are unable to contact the employee within this 24-hour period, you must leave a message for the employee by any practicable means (*e.g.,* voice mail, e-mail, letter) to contact the MRO and inform the MRO of the date and time of this attempted contact.

§ 40.133 Under what circumstances may the MRO verify a test as positive, or as a refusal to test because of adulteration or substitution, without interviewing the employee?

(a) As the MRO, you normally may verify a confirmed positive test (for any drug or drug metabolite, including opiates), or as a refusal to test because of adulteration or substitution, only after interviewing the employee as provided in §§ 40.135–40.145 . However, there are three circumstances in which you may verify such a result without an interview:

(1) You may verify a test result as a positive or refusal to test, as applicable, if the employee expressly declines the opportunity to discuss the test with you. You must maintain complete documentation of this occurrence, including notation of informing, or

attempting to inform, the employee of the consequences of not exercising the option to speak with the you.

(2) You may verify a test result as a positive or refusal to test, as applicable, if the DER has successfully made and documented a contact with the employee and instructed the employee to contact you and more than 72 hours have passed since the time the DER contacted the employee.

(3) You may verify a test result as a positive or refusal to test, as applicable, if neither you nor the DER, after making and documenting all reasonable efforts, has been able to contact the employee within ten days of the date on which the MRO receives the confirmed test result from the laboratory.

(b) As the MRO, when you verify a test result as a positive or refusal to test under this section, you must document the date, time and reason, following the instructions in § 40.163 .

(c) As the MRO, after you have verified a test result as a positive or refusal to test under this section and reported the result to the DER, you must allow the employee to present information to you within 60 days of the verification documenting that serious illness, injury, or other circumstances unavoidably precluded contact with the MRO and/or DER in the times provided. On the basis of such information, you may reopen the verification, allowing the employee to present information concerning whether there is a legitimate medical explanation for the confirmed test result.

§ 40.135 What does the MRO tell the employee at the beginning of the verification interview?

(a) As the MRO, you must tell the employee that the laboratory has determined that the employee's test result was positive, adulterated, substituted, or invalid, as applicable. You must also tell the employee of the drugs for which his or her specimen tested positive, or the basis for the finding of adulteration or substitution.

(b) You must explain the verification interview process to the employee and inform the employee that your decision will be based on information the employee provides in the interview.

(c) You must explain that, if further medical evaluation is needed for the verification process, the employee must comply with your request for this evaluation and that failure to do so is equivalent of expressly declining to discuss the test result.

(d) As the MRO, you must warn an employee who has a confirmed positive, adulterated, substituted or invalid test that you are required to provide to third parties drug test result information and medical information affecting the performance of safety-sensitive duties that the employee gives you in the verification process without the employee's consent (see § 40.327).

(1) You must give this warning to the employee before obtaining any medical information as part of the verification process.

(2) For purposes of this paragraph (d), medical information includes information on medications or other substances affecting the performance of safety-sensitive duties that the employee reports using or medical conditions the employee reports having.

(3) For purposes of this paragraph (d), the persons to whom this information may be provided include the employer, a SAP evaluating the employee as part of the return to duty process (see § 40.293(g)), DOT, another Federal safety agency (*e.g.*, the NTSB), or any state safety agency as required by state law.

(e) You must also advise the employee that, before informing any third party about any medication the employee is using pursuant to a legally valid prescription under the Controlled Substances Act, you will, if the employee consents, contact the prescribing physician to determine if the medication can be changed to one that does not make the employee medically unqualified or does not pose a significant safety risk.

§ 40.137 On what basis does the MRO verify test results involving marijuana, cocaine, amphetamines, or PCP?

(a) As the MRO, you must verify a confirmed positive test result for marijuana, cocaine, amphetamines, and/or PCP unless the employee presents a legitimate medical explanation for the presence of the drug(s)/metabolite(s) in his or her system.

(b) You must offer the employee an opportunity to present a legitimate medical explanation in all cases.

(c) The employee has the burden of proof that a legitimate medical explanation exists. The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the test result, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence concerning a legitimate medical explanation within that time.

(d) If you determine that there is a legitimate medical explanation, you must verify the test result as negative. Otherwise, you must verify the test result as positive.

(e) In determining whether a legitimate medical explanation exists, you may consider the employee's use of a medication from a foreign country. You must exercise your professional judgment consistently with the following principles:

(1) There can be a legitimate medical explanation only with respect to a substance that is obtained legally in a foreign country.

(2) There can be a legitimate medical explanation only with respect to a substance that has a legitimate medical use. Use of a drug of abuse (*e.g.*, heroin, PCP, marijuana) or any other substance (see § 40.151(f) and (g)) that cannot be viewed as having a legitimate medical use can never be the basis for a legitimate medical explanation, even if the substance is obtained legally in a foreign country.

(3) Use of the substance can form the basis of a legitimate medical explanation only if it is used consistently with its proper and intended medical purpose.

(4) Even if you find that there is a legitimate medical explanation under this paragraph (e) and verify a test negative, you may have a responsibility to raise fitness-for-duty considerations with the employer (see § 40.327).

§ 40.139 On what basis does the MRO verify test results involving opiates?

As the MRO, you must proceed as follows when you receive a laboratory confirmed positive opiate result:

(a) If the laboratory detects the presence of 6-acetylmorphine (6-AM) in the specimen, you must verify the test result positive.

(b) In the absence of 6-AM, if the laboratory detects the presence of either morphine or codeine at 15,000 ng/mL or above, you must verify the test result positive unless the employee presents a legitimate medical explanation for the presence of the drug or drug metabolite in his or her system, as in the case of other drugs (see § 40.137). Consumption of food products (*e.g.*, poppy seeds) must not be considered a legitimate medical explanation for the employee having morphine or codeine at these concentrations.

(c) For all other opiate positive results, you must verify a confirmed positive test result for opiates only if you determine that there is clinical evidence, in addition to the urine test, of unauthorized use of any opium, opiate, or opium derivative (i.e., morphine, heroin, or codeine).

(1) As an MRO, it is your responsibility to use your best

professional and ethical judgement and discretion to determine whether there is clinical evidence of unauthorized use of opiates. Examples of information that you may consider in making this judgement include, but are not limited to, the following:

(i) Recent needle tracks;

(ii) Behavioral and psychological signs of acute opiate intoxication or withdrawal;

(iii) Clinical history of unauthorized use recent enough to have produced the laboratory test result;

(iv) Use of a medication from a foreign country. See § 40.137(e) for guidance on how to make this determination.

(2) In order to establish the clinical evidence referenced in paragraphs (c)(1)(i) and (ii) of this section, personal observation of the employee is essential.

(i) Therefore, you, as the MRO, must conduct, or cause another physician to conduct, a face-to-face examination of the employee.

(ii) No face-to-face examination is needed in establishing the clinical evidence referenced in paragraph (c)(1)(iii) or (iv) of this section.

(3) To be the basis of a verified positive result for opiates, the clinical evidence you find must concern a drug that the laboratory found in the specimen. (For example, if the test confirmed the presence of codeine, and the employee admits to unauthorized use of hydrocodone, you do not have grounds for verifying the test positive. The admission must be for the substance that was found).

(4) As the MRO, you have the burden of establishing that there is clinical evidence of unauthorized use of opiates referenced in this paragraph (c). If you cannot make this determination (*e.g.*, there is not sufficient clinical evidence or history), you must verify the test as negative. The employee does not need to show you that a legitimate medical explanation exists if no clinical evidence is established.

§ 40.141 How does the MRO obtain information for the verification decision?

As the MRO, you must do the following as you make the determinations needed for a verification decision:

(a) You must conduct a medical interview. You must review the employee's medical history and any other relevant biomedical factors presented to you by the employee. You may direct the employee to undergo further medical evaluation by you or another physician.

(b) If the employee asserts that the presence of a drug or drug metabolite in his or her specimen results from taking prescription medication, you must review and take all reasonable and necessary steps to verify the authenticity of all medical records the employee provides. You may contact the employee's physician or other relevant medical personnel for further information.

§ 40.143 [Reserved]

§ 40.145 On what basis does the MRO verify test results involving adulteration or substitution?

(a) As an MRO, when you receive a laboratory report that a specimen is adulterated or substituted, you must treat that report in the same way you treat the laboratory's report of a confirmed positive test for a drug or drug metabolite.

(b) You must follow the same procedures used for verification of a confirmed positive test for a drug or drug metabolite (see §§ 40.129–40.135, 40.141, 40.151), except as otherwise provided in this section.

(c) In the verification interview, you must explain the laboratory findings to the employee and address technical questions or issues the employee may raise.

(d) You must offer the employee the opportunity to present a legitimate medical explanation for the laboratory findings with respect to presence of the adulterant in, or the creatinine and specific gravity findings for, the specimen.

(e) The employee has the burden of proof that there is a legitimate medical explanation.

(1) To meet this burden in the case of an adulterated specimen, the employee must demonstrate that the adulterant found by the laboratory entered the specimen through physiological means.

(2) To meet this burden in the case of a substituted specimen, the employee must demonstrate that he or she did produce or could have produced urine, through physiological means, meeting the creatinine and specific gravity criteria of § 40.93(b).

(3) The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the specimen, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence supporting a legitimate medical explanation within that time.

(f) As the MRO or the employer, you are not responsible for arranging, conducting, or paying for any studies, examinations or analyses to determine whether a legitimate medical explanation exists.

(g) As the MRO, you must exercise your best professional judgment in deciding whether the employee has established a legitimate medical explanation.

(1) If you determine that the employee's explanation does not present a reasonable basis for concluding that there may be a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution, as applicable.

(2) If you believe that the employee's explanation may present a reasonable basis for concluding that there is a legitimate medical explanation, you must direct the employee to obtain, within the five-day period set forth in paragraph (e)(3) of this section, a further medical evaluation. This evaluation must be performed by a licensed physician (the ''referral physician''), acceptable to you, with expertise in the medical issues raised by the employee's explanation. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(i) As the MRO or employer, you are not responsible for finding or paying a referral physician. However, on request of the employee, you must provide reasonable assistance to the employee's efforts to find such a physician. The final choice of the referral physician is the employee's, as long as the physician is acceptable to you.

(ii) As the MRO, you must consult with the referral physician, providing guidance to him or her concerning his or her responsibilities under this section. As part of this consultation, you must provide the following information to the referral physician:

(A) That the employee was required to take a DOT drug test, but the laboratory reported that the specimen was adulterated or substituted, which is treated as a refusal to test;

(B) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(C) That the referral physician must agree to follow the requirements of paragraphs (g)(3) through (g)(4) of this section; and

(D) That the referral physician must provide you with a signed statement of his or her recommendations.

(3) As the referral physician, you must evaluate the employee and consider any evidence the employee presents concerning the employee's medical explanation. You may conduct additional tests to determine whether

there is a legitimate medical explanation. Any additional urine tests must be performed in an HHS-certified laboratory.

(4) As the referral physician, you must then make a written recommendation to the MRO about whether the MRO should determine that there is a legitimate medical explanation. As the MRO, you must seriously consider and assess the referral physician's recommendation in deciding whether there is a legitimate medical explanation.

(5) As the MRO, if you determine that there is a legitimate medical explanation, you must cancel the test and inform ODAPC in writing of the determination and the basis for it (*e.g.*, referral physician's findings, evidence produced by the employee).

(6) As the MRO, if you determine that there is not a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution.

(h) The following are examples of types of evidence an employee could present to support an assertion of a legitimate medical explanation for a substituted result.

(1) Medically valid evidence demonstrating that the employee is capable of physiologically producing urine meeting the creatinine and specific gravity criteria of § 40.93(b) .

(i) To be regarded as medically valid, the evidence must have been gathered using appropriate methodology and controls to ensure its accuracy and reliability.

(ii) Assertion by the employee that his or her personal characteristics (*e.g.*, with respect to race, gender, weight, diet, working conditions) are responsible for the substituted result does not, in itself, constitute a legitimate medical explanation. To make a case that there is a legitimate medical explanation, the employee must present evidence showing that the cited personal characteristics actually result in the physiological production of urine meeting the creatinine and specific gravity criteria of § 40.93(b) .

(2) Information from a medical evaluation under paragraph (g) of this section that the individual has a medical condition that has been demonstrated to cause the employee to physiologically produce urine meeting the creatinine and specific gravity criteria of § 40.93(b) .

(i) A finding or diagnosis by the physician that an employee has a medical condition, in itself, does not constitute a legitimate medical explanation.

(ii) To establish there is a legitimate medical explanation, the employee must demonstrate that the cited medical condition actually results in the physiological production of urine meeting the creatinine and specific gravity criteria of § 40.93(b) .

§ 40.147 [Reserved]

§ 40.149 May the MRO change a verified positive drug test result or refusal to test?

(a) As the MRO, you may change a verified positive or refusal to test drug test result only in the following situations:

(1) When you have reopened a verification that was done without an interview with an employee (see § 40.133(c)).

(2) If you receive information, not available to you at the time of the original verification, demonstrating that the laboratory made an error in identifying (*e.g.,* a paperwork mistake) or testing (*e.g.,* a false positive or negative) the employee's primary or split specimen. For example, suppose the laboratory originally reported a positive test result for Employee X and a negative result for Employee Y. You verified the test results as reported to you. Then the laboratory notifies you that it mixed up the two test results, and X was really negative and Y was really positive. You would change X's test result from positive to negative and contact Y to conduct a verification interview.

(3) If, within 60 days of the original verification decision—

(i) You receive information that could not reasonably have been provided to you at the time of the decision demonstrating that there is a legitimate medical explanation for the presence of drug(s)/metabolite(s) in the employee's specimen; or

(ii) You receive credible new or additional evidence that a legitimate medical explanation for an adulterated or substituted result exists.

Example to Paragraph (a)(3): If the employee's physician provides you a valid prescription that he or she failed to find at the time of the original verification, you may change the test result from positive to negative if you conclude that the prescription provides a legitimate medical explanation for the drug(s)/ metabolite(s) in the employee's specimen.

(4) If you receive the information in paragraph (a)(3) of this section after the 60-day period, you must consult with ODAPC prior to changing the result.

(5) When you have made an administrative error and reported an incorrect result.

(b) If you change the result, you must immediately notify the DER in writing, as provided in §§ 40.163–40.165.

(c) You are the only person permitted to change a verified test result.

§ 40.151 What are MROs prohibited from doing as part of the verification process?

As an MRO, you are prohibited from doing the following as part of the verification process:

(a) You must not consider any evidence from tests of urine samples or other body fluids or tissues (*e.g.,* blood or hair samples) that are not collected or tested in accordance with this part. For example, if an employee tells you he went to his own physician, provided a urine specimen, sent it to a laboratory, and received a negative test result or a DNA test result questioning the identity of his DOT specimen, you are required to ignore this test result.

(b) In reviewing the CCF, you must not consider evidence extrinsic to the CCF in determining whether the test is valid. For example, you must review only what is on the face of the CCF for this purpose, not assertions by the employee that the CCF does not accurately reflect what happened at the collection site.

(c) It is not your function to determine whether the employer should have directed that a test occur. For example, if an employee tells you that the employer misidentified her as the subject of a random test, or directed her to take a reasonable suspicion or post-accident test without proper grounds under a DOT agency drug or alcohol regulation, you must inform the employee that you cannot play a role in deciding these issues.

(d) It is not your function to consider explanations of confirmed positive, adulterated, or substituted test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that someone slipped amphetamines into her drink at a party, that she unknowingly ingested a marijuana brownie, or that she traveled in a closed car with several people smoking crack. MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (*e.g.,* under a state law that purports to authorize such recommendations, such as the

''medical marijuana'' laws that some states have adopted).

(f) You must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative. You also must not accept such an explanation related to consumption of coca teas as a basis for verifying a cocaine test result as negative. Consuming or using such a product is not a legitimate medical explanation.

(g) You must not accept an assertion that there is a legitimate medical explanation for the presence of PCP or 6-AM in a specimen. There are no legitimate medical explanations for the presence of these substances.

(h) You must not accept, as a legitimate medical explanation for an adulterated specimen, an assertion that soap, bleach, or glutaraldehyde entered a specimen through physiological means. There are no physiological means through which these substances can enter a specimen.

(i) You must not accept, as a legitimate medical explanation for a substituted specimen, an assertion that an employee can produce urine with no detectable creatinine. There are no physiological means through which a person can produce a urine specimen having this characteristic.

§ 40.153 How does the MRO notify employees of their right to a test of the split specimen?

(a) As the MRO, when you have verified a drug test as positive for a drug or drug metabolite, or as a refusal to test because of adulteration or substitution, you must notify the employee of his or her right to have the split specimen tested. You must also notify the employee of the procedures for requesting a test of the split specimen.

(b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.

(c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (*e.g.,* by use of an answering machine with a ''time stamp'' feature when there is no one in your office to answer the phone).

(d) You must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. You must also tell the employee that the employer may seek reimbursement for the cost of the test (see § 40.173).

(e) You must tell the employee that additional tests of the specimen *e.g.,* DNA tests) are not authorized.

§ 40.155 What does the MRO do when a negative or positive test result is also dilute?

(a) When the laboratory reports that a specimen is dilute, you must, as the MRO, report to the DER that the specimen, in addition to being negative or positive, is dilute.

(b) You must check the ''dilute'' box (Step 6) on Copy 2 of the CCF.

(c) You may only report a dilute test result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature.

(d) When you report a dilute specimen to the DER, you must explain to the DER the employer's obligations and choices under § 40.197.

§ 40.157 [Reserved]

§ 40.159 What does the MRO do when a drug test result is invalid?

(a) As the MRO, when the laboratory reports that the test result is an invalid result, you must do the following:

(1) Discuss the laboratory results with a certifying scientist to obtain more specific information.

(2) Contact the employee and inform the employee that the specimen was invalid or contained an unexplained interfering substance. In contacting the employee, use the procedures set forth in § 40.131.

(3) After explaining the limits of disclosure (see §§ 40.135(d) and 40.327), you should inquire as to medications the employee may have taken that may interfere with some immunoassay tests.

(4) If the employee gives an explanation that is acceptable, you must:

(i) Place a check mark in the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF and enter ''Invalid Result'' and ''direct observation collection not required'' on the ''Remarks'' line.

(ii) Report to the DER that the test is cancelled, the reason for cancellation, and that no further action is required unless a negative test result is required (*i.e.,* pre-employment, return-to-duty, or follow-up tests).

(5) If the employee is unable to provide an explanation and/or a valid prescription for a medication that interfered with the immunoassay test but denies having adulterated the specimen, you must:

(i) Place a check mark in the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF and enter ''Invalid Result'' and ''direct observation collection required'' on the ''Remarks'' line.

(ii) Report to the DER that the test is cancelled, the reason for cancellation, and that a second collection must take place immediately under direct observation.

(iii) Instruct the employer to ensure that the employee has the minimum possible advance notice that he or she must go to the collection site.

(b) You may only report an invalid test result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature.

(c) If the employee admits to having adulterated or substituted the specimen, you must, on the same day, write and sign your own statement of what the employee told you. You must then report a refusal to test in accordance with § 40.163 .

§ 40.161 What does the MRO do when a drug test specimen is rejected for testing?

As the MRO, when the laboratory reports that the specimen is rejected for testing (*e.g.,* because of a fatal or uncorrected flaw), you must do the following:

(a) Place a check mark in the ''Test Cancelled'' box (Step 6) on Copy 2 of the CCF and enter the reason on the ''Remarks'' line.

(b) Report to the DER that the test is cancelled and the reason for cancellation, and that no further action is required unless a negative test is required (*e.g.,* in the case of a pre-employment, return-to-duty, or follow-up test).

(c) You may only report a test cancelled because of a rejected for testing test result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature.

§ 40.163 How does the MRO report drug test results?

(a) As the MRO, it is your responsibility to report the drug test results to the employer in writing.

(1) You or a staff member may rubber stamp a report of negative results. If you use a rubber stamp, you or your staff must also initial the stamp to identify who affixed the stamp to the report.

(2) You, as the MRO, must sign reports of all other results.

(b) You may use a signed or stamped and dated legible photocopy of Copy 2 of the CCF to report test results.

(c) If you do not report test results using Copy 2 of the CCF for this purpose, you must provide a written report (*e.g.,* a letter) for each test result. This report must, as a minimum, include the following information:

(1) Full name, as indicated on the CCF, of the employee tested;

(2) Specimen ID number from the CCF and the donor SSN or employee ID number;

(3) Reason for the test as indicated on the CCF (*e.g.,* random, post-accident);

(4) Date of the collection;

(5) Result of the test (*i.e.,* positive, negative, dilute, refusal to test, test cancelled) and the date the result was verified by the MRO;

(6) For verified positive tests, the drug(s)/metabolite(s) for which the test was positive;

(7) For cancelled tests, the reason for cancellation; and

(8) For refusals to test, the reason for the refusal determination (e.g., in the case of an adulterated test result, the name of the adulterant).

(d) You must retain a signed or stamped and dated copy of Copy 2 of the CCF in your records. If you do not use Copy 2 for reporting results, you must maintain a copy of the signed or stamped and dated letter in addition to the signed or stamped and dated Copy 2.

(e) You must not use Copy 1 of the CCF to report drug test results.

(f) You must not provide quantitative values to the DER or C/TPA for drug or validity test results. However, you must provide the test information in your possession to a SAP who consults with you (see § 40.293(g)).

§ 40.165 To whom does the MRO transmit reports of drug test results?

(a) As the MRO, you must report all drug test results to the DER, except in the circumstances provided for in § 40.345 .

(b) If the employer elects to receive reports of results through a C/TPA, acting as an intermediary as provided in § 40.345 , you must report the results through the designated C/TPA.

§ 40.167 How are MRO reports of drug results transmitted to the employer?

As the MRO or C/TPA who transmits drug test results to the employer, you must comply with the following requirements:

(a) You must report the results in a confidential manner.

(b) You must transmit to the DER on the same day the MRO verifies the result or the next business day all verified positive test results, results requiring an immediate collection under direct observation, adulterated or substituted specimen results, and other refusals to test.

(1) Direct telephone contact with the DER is the preferred method of immediate reporting. Follow up your phone call with appropriate documentation (see § 40.163).

(2) You are responsible for identifying yourself to the DER, and the DER must have a means to confirm your identification.

(3) The MRO's report that you transmit to the employer must contain all of the information required by § 40.163 .

(c) You must transmit the MRO's written report of verified test to the DER so that the DER receives them within two days of verification by the MRO.

(d) In transmitting test results, you or the C/TPA and the employer must ensure the security of the transmission and limit access to any transmission, storage, or retrieval systems.

§ 40.169 Where is other information concerning the role of MROs and the verification process found in this regulation?

You can find more information concerning the role of MROs in several sections of this part:

§ 40.3—Definition.
§ § 40.47–40.49—Correction of form and kit errors.
§ 40.67—Role in direct observation and other atypical test situations.
§ 40.83—Laboratory handling of fatal and correctable flaws.
§ 40.97—Laboratory handling of test results and quantitative values.
§ 40.99—Authorization of longer laboratory retention of specimens.
§ 40.101—Relationship with laboratories; avoidance of conflicts of interest.
§ 40.105—Notification of discrepancies in blind specimen results.
§ 40.171—Request for test of split specimen.
§ 40.187—Action concerning split specimen test results.
§ 40.193—Role in ''shy bladder'' situations.
§ 40.195—Role in cancelling tests.
§§ 40.199–40.203—Documenting errors in tests.
§ 40.327—Confidentiality and release of information.
§ 40.347—Transfer of records.
§ 40.353—Relationships with service agents.

Subpart H—Split Specimen Tests

§ 40.171 How does an employee request a test of a split specimen?

(a) As an employee, when the MRO has notified you that you have a verified positive drug test or refusal to test because of adulteration or substitution, you have 72 hours from the time of notification to request a test of the split specimen. The request may be verbal or in writing. If you make this request to the MRO within 72 hours, you trigger the requirements of this section for a test of the split specimen.

(b)(1) If, as an employee, you have not requested a test of the split specimen within 72 hours, you may present to the MRO information documenting that serious injury, illness, lack of actual notice of the verified test result, inability to contact the MRO (*e.g.*, there was no one in the MRO's office and the answering machine was not working), or other circumstances unavoidably prevented you from making a timely request.

(2) As the MRO, if you conclude from the employee's information that there was a legitimate reason for the employee's failure to contact you within 72 hours, you must direct that the test of the split specimen take place, just as you would when there is a timely request.

(c) When the employee makes a timely request for a test of the split specimen under paragraphs (a) and (b) of this section, you must, as the MRO, immediately provide written notice to the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen to a second HHS-certified laboratory. You must also document the date and time of the employee's request.

§ 40.173 Who is responsible for paying for the test of a split specimen?

(a) As the employer, you are responsible for making sure (*e.g.*, by establishing appropriate accounts with laboratories for testing split specimens) that the MRO, first laboratory, and second laboratory perform the functions noted in §§ 40.175–40.185 in a timely manner, once the employee has made a timely request for a test of the split specimen.

(b) As the employer, you must not condition your compliance with these requirements on the employee's direct payment to the MRO or laboratory or the employee's agreement to reimburse you for the costs of testing. For example, if you ask the employee to pay for some or all of the cost of testing the split specimen, and the employee is unwilling or unable to do so, you must ensure that the test takes place in a timely manner, even though this means that you pay for it.

(c) As the employer, you may seek payment or reimbursement of all or part of the cost of the split specimen from the employee (*e.g.*, through your written company policy or a collective bargaining agreement). This part takes

no position on who ultimately pays the cost of the test, so long as the employer ensures that the testing is conducted as required and the results released appropriately.

§ 40.175 What steps does the first laboratory take with a split specimen?

(a) As the laboratory at which the primary and split specimen first arrive, you must check to see whether the split specimen is available for testing.

(b) If the split specimen is unavailable or appears insufficient, you must then do the following:

(1) Continue the testing process for the primary specimen as you would normally. Report the results for the primary specimen without providing the MRO information regarding the unavailable split specimen.

(2) Upon receiving a letter from the MRO instructing you to forward the split specimen to another laboratory for testing, report to the MRO that the split specimen is unavailable for testing. Provide as much information as you can about the cause of the unavailability.

(c) As the laboratory that tested the primary specimen, you are not authorized to open the split specimen under any circumstances (except when the split specimen is redesignated as provided in § 40.83).

(d) When you receive written notice from the MRO instructing you to send the split specimen to another HHS-certified laboratory, you must forward the following items to the second laboratory:

(1) The split specimen in its original specimen bottle, with the seal intact;

(2) A copy of the MRO's written request; and

(3) A copy of Copy 1 of the CCF, which identifies the drug(s)/metabolite(s) or the validity criteria to be tested for.

(e) You must not send to the second laboratory any information about the identity of the employee. Inadvertent disclosure does not, however, cause a fatal flaw.

(f) This subpart does not prescribe who gets to decide which HHS-certified laboratory is used to test the split specimen. That decision is left to the parties involved.

§ 40.177 What does the second laboratory do with the split specimen when it is tested to reconfirm the presence of a drug or drug metabolite?

(a) As the laboratory testing the split specimen, you must test the split specimen for the drug(s)/drug metabolite(s) detected in the primary specimen.

(b) You must conduct this test without regard to the cutoff concentrations of § 40.87 .

(c) If the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) that were reported positive in the primary specimen, you must conduct validity tests in an attempt to determine the reason for being unable to reconfirm the presence of the drug(s)/metabolite(s). You should conduct the same validity tests as you would conduct on a primary specimen set forth in § 40.91 .

(d) In addition, if the test fails to reconfirm the presence of the drugs/drugs metabolites or validity criteria that were reported in the primary specimen, you may transmit the specimen or an aliquot of it to another HHS-certified laboratory that will conduct another reconfirmation test.

§ 40.179 What does the second laboratory do with the split specimen when it is tested to reconfirm an adulterated test result?

As the laboratory testing the split specimen, you must test the split specimen for the adulterant detected in the primary specimen, using the criteria of § 40.95 just as you would do for a primary specimen. The result of the primary specimen is reconfirmed if the split specimen meets these criteria.

§ 40.181 What does the second laboratory do with the split specimen when it is tested to reconfirm a substituted test result?

As the laboratory testing the split specimen, you must test the split specimen using the criteria of § 40.93(b), just as you would do for a primary specimen. The result of the primary specimen is reconfirmed if the split specimen meets these criteria.

§ 40.183 What information do laboratories report to MROs regarding split specimen results?

(a) As the laboratory responsible for testing the split specimen, you must report split specimen test results by checking the ''Reconfirmed'' box or the ''Failed to Reconfirm'' box (Step 5(b)) on Copy 1 of the CCF.

(b) If you check the ''Failed to Reconfirm'' box, one of the following statements must be included (as appropriate) on the ''Reason'' line (Step 5(b)):

(1) ''Drug(s)/Drug Metabolite(s) Not Detected.''

(2) ''Adulterant not found within criteria.''

(3) ''Specimen not consistent with substitution criteria [specify creatinine, specific gravity, or both]''

(4) ''Specimen not available for testing.''

(c) As the laboratory certifying scientist, enter your name, sign, and date the CCF.

§ 40.185 Through what methods and to whom must a laboratory report split specimen results?

(a) As the laboratory testing the split specimen, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or another service agent (*e.g.*, a C/TPA).

(b) You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF, which has been signed by the certifying scientist.

(c) You must transmit the laboratory result to the MRO immediately, preferably on the same day or next business day as the result is signed and released.

§ 40.187 What does the MRO do with split specimen laboratory results?

As an MRO, you must take the following actions when a laboratory reports the following results of split specimen tests:

(a) *Reconfirmed.* (1) In the case of a reconfirmed positive test for a drug or drug metabolite, report the reconfirmation to the DER and the employee.

(2) In the case of a reconfirmed adulterated or substituted result, report to the DER and the employee that the specimen was adulterated or substituted, either of which constitutes a refusal to test. Therefore, ''refusal to test'' is the final result.

(b) *Failed to Reconfirm: Drug(s)/Drug Metabolite(s) Not Detected.* (1) Report to the DER and the employee that both tests must be cancelled.

(2) Using the format in Appendix D to this part, inform ODAPC of the failure to reconfirm.

(c) *Failed to Reconfirm: Adulteration or Substitution (as appropriate) Criteria Not Met.* (1) Report to the DER and the employee that both tests must be cancelled.

(2) Using the format in Appendix D to this part, inform ODAPC of the failure to reconfirm.

(d) *Failed to Reconfirm: Specimen not Available for Testing.* (1) Report to the DER and the employee that both tests must be cancelled and the reason for cancellation.

(2) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(3) Using the format in Appendix D to this part, notify ODAPC of the failure to reconfirm.

(e) Enter your name, sign and date (Step 7) of Copy 2 of the CCF.

(f) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see § 40.163) to the employer and keep a copy for your records. Transmit the document as provided in § 40.167.

§ 40.189 Where is other information concerning split specimens found in this regulation?

You can find more information concerning split specimens in several sections of this part:

§ 40.3—Definition.
§ 40.65—Quantity of split specimen.
§ 40.67—Directly observed test when split specimen is unavailable.
§§ 40.71–40.73—Collection process for split specimens.
§ 40.83—Laboratory accessioning of split specimens.
§ 40.99—Laboratory retention of split specimens.
§ 40.103—Blind split specimens.
§ 40.153—MRO notice to employees on tests of split specimen.
§§ 40.193 and 40.201—MRO actions on insufficient or unavailable split specimens.
Appendix D to Part 40—Report format for split specimen failure to reconfirm.

Subpart I—Problems in Drug Tests

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

(a) As an employee, you have refused to take a drug test if you:

(1) Fail to appear for any test within a reasonable time, as determined by the employer, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by C/TPA (see § 40.61(a));

(2) Fail to remain at the testing site until the testing process is complete;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations;

(4) In the case of a directly observed or monitored collection in a drug test, fail to permit the observation or monitoring of your provision of a specimen (see §§ 40.67(l) and 40.69(g));

(5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2));

(6) Fail or decline to take a second test the employer or collector has directed you to take;

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER as part of the ''shy bladder'' procedures of this part (see § 40.193(d)); or

(8) Fail to cooperate with any part of the testing process (*e.g.*, refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process).

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (or in a separate document which you cause to be attached to the form), immediately notify the DER by any means (*e.g.*, telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (*e.g.*, physician evaluating a ''shy bladder'' condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

(1) As the collector, you must note the refusal in the ''Remarks'' line (Step 2), and sign and date the CCF.

(2) As the MRO, you must note the refusal by checking the ''refused to test because'' box (Step 6) on Copy 2 of the CCF, and add the reason on the ''Remarks'' line. You must then sign and date the CCF.

(e) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test.

§ 40.193 What happens when an employee does not provide a sufficient amount of urine for a drug test?

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (*i.e.,* 45 mL of urine).

(b) As the collector, you must do the following:

(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see § 40.65(b) and (c)).

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink.

(3) If the employee refuses to make the attempt to provide a new urine specimen, you must discontinue the collection, note the fact on the ''Remarks'' line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the ''Remarks'' line of the CCF (Step 2), and immediately notify the DER.

(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(c) As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine (see paragraph (b)(4) of this section), you must, after consulting with the MRO, direct the employee to obtain, within five working days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(1) As the MRO, if another physician will perform the evaluation, you must provide the other physician with the following information and instructions:

(i) That the employee was required to take a DOT drug test, but was unable to provide a sufficient amount of urine to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(iii) That the referral physician must agree to follow the requirements of paragraphs (d) through (g) of this section.

(d) As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:

(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check ''Test Cancelled'' (Step 6) on the CCF; and

(ii) Sign and date the CCF.

(2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee

from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check ''Refusal to test because'' (Step 6) on the CCF and enter reason in the remarks line; and

(ii) Sign and date the CCF.

(e) For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (*e.g.,* a urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of ''situational anxiety'' or dehydration.

(f) As the referral physician making the evaluation, after completing your evaluation, you must provide a written statement of your recommendations and the basis for them to the MRO. You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(g) If, as the referral physician making this evaluation in the case of a pre-employment test, you determine that the employee's medical condition is a serious and permanent or long-term disability that is highly likely to prevent the employee from providing a sufficient amount of urine for a very long or indefinite period of time, you must set forth your determination and the reasons for it in your written statement to the MRO. As the MRO, upon receiving such a report, you must follow the requirements of § 40.195, where applicable.

(h) As the MRO, you must seriously consider and assess the referral physician's recommendations in making your determination about whether the employee has a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. You must report your determination to the DER in writing as soon as you make it.

(i) As the employer, when you receive a report from the MRO indicating that a test is cancelled as provided in paragraph (d)(1) of this section, you take no further action with respect to the employee. The employee remains in the random testing pool.

§ 40.195 What happens when an individual is unable to provide a sufficient amount of urine for a pre-employment or return-to-duty test because of a permanent or long-term medical condition?

(a) This section concerns a situation in which an employee has a medical condition that precludes him or her from providing a sufficient specimen for a pre-employment or return-to-duty test and the condition involves a permanent or long-term disability. As the MRO in this situation, you must do the following:

(1) You must determine if there is clinical evidence that the individual is an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation and through consultation with the employee's physician and/or the physician who conducted the evaluation under § 40.193(d).

(2) If you do not personally conduct the medical evaluation, you must ensure that one is conducted by a licensed physician acceptable to you.

(3) For purposes of this section, the MRO or the physician conducting the evaluation may conduct an alternative test (*e.g.,* blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(b) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report the result to the employer as a negative test with written notations regarding results of both the evaluation conducted under § 40.193(d) and any further medical examination. This report must state the basis for the determination that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and for the determination that no signs and symptoms of drug use exist.

(1) Check ''Negative'' (Step 6) on the CCF.

(2) Sign and date the CCF.

(c) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the employer as a cancelled test with written notations regarding results of both the evaluation conducted under § 40.193(d) and any further medical examination. This report must state that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purposes of a negative test (*i.e.,* the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test is needed for that purpose).

(d) For purposes of this section, permanent or long-term medical conditions are those physiological, anatomic, or psychological abnormalities documented as being present prior to the attempted collection, and considered not amenable to correction or cure for an extended period of time, if ever.

(1) Examples would include destruction (any cause) of the glomerular filtration system leading to renal failure; unrepaired traumatic disruption of the urinary tract; or a severe psychiatric disorder focused on genito-urinary matters.

(2) Acute or temporary medical conditions, such as cystitis, urethritis or prostatitis, though they might interfere with collection for a limited period of time, cannot receive the same exceptional consideration as the permanent or long-term conditions discussed in paragraph (d)(1) of this section.

§ 40.197 What happens when an employer receives a report of a dilute specimen?

(a) As the employer, if the MRO informs you that a positive drug test was dilute, you simply treat the test as a verified positive test. You must not direct the employee to take another test based on the fact that the specimen was dilute.

(b) If the MRO informs you that a negative drug test was dilute, you may, but are not required to, direct the employee to take another test immediately. Such recollections must not be collected under direct observation, unless there is another basis for use of direct observation (see § 40.67(b) and (c)).

(c) You must treat all employees the same for this purpose. For example, you must not retest some employees and not others. You may, however, establish different policies for different types of tests (*e.g.,* conduct retests in pre-employment test situations, but not in random test situations). You must inform your employees in advance of your decisions on these matters.

(d) If you direct the employee to take another test, you must ensure that the employee is given the minimum possible advance notice that he or she must go to the collection site.

(e) If you direct the employee to take another test, the result of the second test—not that of the original test—becomes the test of record, on which you rely for purposes of this part.

(f) If you require employees to take another test, and the second test is also negative and dilute, you are not permitted to make the employee take a third test because the second test was dilute.

(g) If you direct the employee to take another test and the employee declines to do so, the employee has refused the test for purpose of this part and DOT agency regulations.

§ 40.199 What problems always cause a drug test to be cancelled?

(a) As the MRO, when the laboratory discovers a ''fatal flaw'' during its processing of incoming specimens (see § 40.83), the laboratory will report to you that the specimen has been ''Rejected for Testing'' (with the reason stated). You must always cancel such a test.

(b) The following are ''fatal flaws'':

(1) There is no printed collector's name *and* no collector's signature;

(2) The specimen ID numbers on the specimen bottle and the CCF do not match;

(3) The specimen bottle seal is broken or shows evidence of tampering (and a split specimen cannot be redesignated, see § 40.83(g)); and

(4) Because of leakage or other causes, there is an insufficient amount of urine in the primary specimen bottle for analysis and the specimens cannot be redesignated (see § 40.83(g)).

(c) You must report the result as provided in § 40.161 .

§ 40.201 What problems always cause a drug test to be cancelled and may result in a requirement for another collection?

As the MRO, you must cancel a drug test when a laboratory reports that any of the following problems have occurred. You must inform the DER that the test was cancelled. You must also direct the DER to ensure that an additional collection occurs immediately, if required by the applicable procedures specified in paragraphs (a) through (e) of this section.

(a) The laboratory reports an ''Invalid Result.'' You must follow applicable procedures in § 40.159 (recollection under direct observation may be required).

(b) The laboratory reports the result as ''Rejected for Testing.'' You must follow applicable procedures in § 40.161 (a recollection may be required).

(c) The laboratory's test of the primary specimen is positive and the split specimen is reported by the laboratory as ''Failure to Reconfirm: Drug(s)/Drug Metabolite(s) Not Detected.'' You must follow applicable procedures in § 40.187(b) (no recollection is required in this case).

(d) The laboratory's test result for the primary specimen is adulterated or substituted and the split specimen is reported by the laboratory as ''Adulterant not found within criteria,'' or '' specimen not consistent with substitution criteria, as applicable. You must follow applicable procedures in § 40.187(c) (no recollection is required in this case).

(e) The laboratory's test of the primary specimen is positive, adulterated, or substituted and the split specimen is unavailable for testing. You must follow applicable procedures in § 40.187(d) (recollection under direct observation is required in this case).

(f) The examining physician has determined that there is an acceptable medical explanation of the employee's failure to provide a sufficient amount of urine. You must follow applicable procedures in § 40.193(d)(1) (no recollection is required in this case).

§ 40.203 What problems cause a drug test to be cancelled unless they are corrected?

(a) As the MRO, when a laboratory discovers a ''correctable flaw'' during its processing of incoming specimens (see § 40.83), the laboratory will attempt to correct it. If the laboratory is unsuccessful in this attempt, it will report to you that the specimen has been ''Rejected for Testing'' (with the reason stated).

(b) The following are ''correctable flaws'' that laboratories must attempt to correct:

(1) The collector's signature is omitted on the certification statement on the CCF.

(2) The specimen temperature was not checked and the ''Remarks'' line did not contain an entry regarding the temperature being out of range.

(c) As the MRO, when you discover a ''correctable flaw'' during your review of the CCF, you must cancel the test unless the flaw is corrected.

(d) The following are correctable flaws that you must attempt to correct:

(1) The employee's signature is omitted from the certification statement, unless the employee's failure or refusal to sign is noted on the ''Remarks'' line of the CCF.

(2) The certifying scientist's signature is omitted on the laboratory copy of the CCF for a positive, adulterated, substituted, or invalid test result.

(3) The collector uses a non-DOT form for the test, provided that the collection and testing process is conducted in accordance with DOT procedures in an HHS-certified laboratory following DOT initial and confirmation test criteria.

§ 40.205 How are drug test problems corrected?

(a) As a collector, you have the responsibility of trying to successfully complete a collection procedure for each employee.

(1) If, during or shortly after the collection process, you become aware of any event that prevents the completion of a valid test or collection (*e.g.,* a procedural or paperwork error), you must try to correct the problem promptly, if doing so is practicable. You may conduct another collection as part of this effort.

(2) If another collection is necessary, you must begin the new collection procedure as soon as possible, using a new CCF and a new collection kit.

(b) If, as a collector, laboratory, MRO, employer, or other person implementing these drug testing regulations, you become aware of a problem that can be corrected (see § 40.203), but which has not already been corrected under paragraph (a) of this section, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a statement that it is true and accurate. For example, suppose you are a collector, and you forgot to make a notation on the ''Remarks'' line of the CCF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification and that your statement is true and accurate. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(2) If the problem is the use of a non-Federal form, you must, as the person responsible for the use of the incorrect form, provide a signed statement that the incorrect form contains all the information needed for a valid DOT drug test, that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control. The statement must also list the steps you have taken to prevent future use of non-Federal forms for DOT tests. For this flaw to have been corrected, the test of the specimen must have occurred at a HHS-certified laboratory where it was tested using the testing protocol in this part. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(3) You must maintain the written documentation of a correction with the CCF.

(4) You must mark the CCF in such a way (*e.g.,* stamp noting correction) as to make it obvious on the face of the CCF that you corrected the flaw.

(c) If the correction does not take place, as the MRO you must cancel the test.

§ 40.207 What is the effect of a cancelled drug test?

(a) A cancelled drug test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a positive test or other violation of a DOT drug testing regulation (*e.g.,* removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test for the purposes of a negative test to authorize the employee to perform safety-sensitive functions (*i.e.,* in the case of a pre-employment, return-to-duty, or follow-up test).

(3) However, as an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other provisions of this part that require another test to be conducted (*e.g.,* §§ 40.159(a)(5) and 40.187(b)).

(b) A cancelled test does not count toward compliance with DOT requirements (*e.g.,* being applied toward the number of tests needed to meet the employer's minimum random testing rate).

(c) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (*i.e.,* a test under company authority).

§ 40.209 What is the effect of procedural problems that are not sufficient to cancel a drug test?

(a) As a collector, laboratory, MRO, employer or other person administering the drug testing process, you must document any errors in the testing process of which you become aware, even if they are not considered problems that will cause a test to be cancelled as listed in this subpart. Decisions about the ultimate impact of these errors will be determined by other administrative or legal proceedings, subject to the limitations of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. Matters that do not result in the cancellation of a test include, but are not limited to, the following:

(1) A minor administrative mistake (*e.g.,* the omission of the employee's middle initial, a transposition of numbers in the employee's social security number);

(2) An error that does not affect employee protections under this part (*e.g.,* the collector's failure to add bluing agent to the toilet bowl, which adversely affects only the ability of the collector to detect tampering with the specimen by the employee);

(3) The collection of a specimen by a collector who is required to have been trained (see § 40.33), but who has not met this requirement;

(4) A delay in the collection process (see § 40.61(a));

(5) Verification of a test result by an MRO who has the basic credentials to be qualified as an MRO (see § 40.121(a) through (b)) but who has not met training and/or documentation requirements (see § 40.121(c) through (e));

(6) The failure to directly observe or monitor a collection that the rule requires or permits to be directly observed or monitored, or the unauthorized use of direct observation or monitoring for a collection;

(7) The fact that a test was conducted in a facility that does not meet the requirements of § 40.41;

(8) If the specific name of the courier on the CCF is omitted or erroneous;

(9) Personal identifying information is inadvertently contained on the CCF (*e.g.,* the employee signs his or her name on the laboratory copy); or

(10) Claims that the employee was improperly selected for testing.

(c) As an employer, these types of errors, even though not sufficient to cancel a drug test result, may subject you to enforcement action under DOT agency regulations.

Subpart J—Alcohol Testing Personnel

§ 40.211 Who conducts DOT alcohol tests?

(a) Screening test technicians (STTs) and breath alcohol technicians (BATs) meeting their respective requirements of this subpart are the only people authorized to conduct DOT alcohol tests.

(b) An STT can conduct only alcohol screening tests, but a BAT can conduct alcohol screening and confirmation tests.

(c) As a BAT- or STT-qualified immediate supervisor of a particular employee, you may not act as the STT or BAT when that employee is tested, unless no other STT or BAT is available and DOT agency regulations do not prohibit you from doing so.

§ 40.213 What training requirements must STTs and BATs meet?

To be permitted to act as a BAT or STT in the DOT alcohol testing program, you must meet each of the requirements of this section:

(a) *Basic information.* You must be knowledgeable about the alcohol testing procedures in this part and the current DOT guidance. These documents and information are available from ODAPC (Department of Transportation, 400 7th Street, SW., Room 10403, Washington DC, 20590, 202–366–3784, or on the ODAPC web site, http://www.dot.gov/ost/dapc)).

(b) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph (b).

(1) Qualification training must be in accordance with the DOT Model BAT or STT Course, as applicable. The DOT Model Courses are available from ODAPC (Department of Transportation, 400 7th Street, SW., Room 10403, Washington DC, 20590, 202–366–3784, or on the ODAPC web site, http://www.dot.gov/ost/dapc). The training can also be provided using a course of instruction equivalent to the DOT Model Courses. On request, ODAPC will review BAT and STT instruction courses for equivalency.

(2) Qualification training must include training to proficiency in using the alcohol testing procedures of this part and in the operation of the particular alcohol testing device(s) (*i.e.,* the ASD(s) or EBT(s)) you will be using.

(3) The training must emphasize that you are responsible for maintaining the integrity of the testing process, ensuring the privacy of employees being tested, and avoiding conduct or statements that could be viewed as offensive or inappropriate.

(4) The instructor must be an individual who has demonstrated necessary knowledge, skills, and abilities by regularly conducting DOT alcohol tests as an STT or BAT, as applicable, for a period of at least a year, who has conducted STT or BAT training, as applicable, under this part for a year, or who has successfully completed a ''train the trainer'' course.

(c) *Initial Proficiency Demonstration.* Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in alcohol testing under this part by completing three consecutive error-free mock tests.

(1) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are ''error-free.'' This person must be an individual who meets the requirements of paragraph (b)(4) of this section.

(2) These tests must use the alcohol testing devices (*e.g.,* EBT(s) or ASD(s)) that you will use as a BAT or STT.

(3) If you are an STT who will be using an ASD that indicates readings by

changes, contrasts, or other readings in color, you must demonstrate as part of the mock test that you are able to discern changes, contrasts, or readings correctly.

(d) *Schedule for qualification training and initial proficiency demonstration.* The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(1) If you became a BAT or STT before August 1, 2001, you were required to have met the requirements set forth in paragraphs (b) and (c) of this section, and you do not have to meet them again.

(2) If you become a BAT or STT on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform BAT or STT functions.

(e) *Refresher training.* No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) *Error Correction Training.* If you make a mistake in the alcohol testing process that causes a test to be cancelled (*i.e.,* a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (b)(4) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the alcohol testing procedures of this part by completing three consecutive error-free mock tests. The mock tests must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock tests were error-free.

(g) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are negotiating to use your services.

(h) *Other persons who may serve as BATs or STTs.* (1) Anyone meeting the requirements of this section to be a BAT may act as an STT, provided that the individual has demonstrated initial proficiency in the operation of the ASD that he or she is using, as provided in paragraph (c) of this section.

(2) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. They are not required to also complete the training requirements of this section in order to act as BATs. In order for a test conducted by such an officer to be accepted under DOT alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT or ASD that was used for the test.

§ 40.215 What information about the DER do employers have to provide to BATs and STTs?

As an employer, you must provide to the STTs and BATs the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

§ 40.217 Where is other information on the role of STTs and BATs found in this regulation?

You can find other information on the role and functions of STTs and BATs in the following sections of this part:

§ 40.3—Definitions.
§ 40.223—Responsibility for supervising employees being tested.
§§ 40.225–40.227—Use of the alcohol testing form.
§§ 40.241–40.245—Screening test procedures with ASDs and EBTs.
§§ 40.251–40.255—Confirmation test procedures.
§ 40.261—Refusals to test.
§§ 40.263–40.265—Insufficient saliva or breath.
§ 40.267—Problems requiring cancellation of tests.
§§ 40.269–40.271—Correcting problems in tests.

Subpart K—Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

§ 40.221 Where does an alcohol test take place?

(a) A DOT alcohol test must take place at an alcohol testing site meeting the requirements of this section.

(b) If you are operating an alcohol testing site, you must ensure that it meets the security requirements of § 40.223.

(c) If you are operating an alcohol testing site, you must ensure that it provides visual and aural privacy to the employee being tested, sufficient to prevent unauthorized persons from seeing or hearing test results.

(d) If you are operating an alcohol testing site, you must ensure that it has all needed personnel, materials, equipment, and facilities to provide for the collection and analysis of breath and/or saliva samples, and a suitable clean surface for writing.

(e) If an alcohol testing site fully meeting all the visual and aural privacy requirements of paragraph (c) is not readily available, this part allows a reasonable suspicion or post-accident test to be conducted at a site that partially meets these requirements. In this case, the site must afford visual and aural privacy to the employee to the greatest extent practicable.

(f) An alcohol testing site can be in a medical facility, a mobile facility (*e.g.,* a van), a dedicated collection facility, or any other location meeting the requirements of this section.

§ 40.223 What steps must be taken to protect the security of alcohol testing sites?

(a) If you are a BAT, STT, or other person operating an alcohol testing site, you must prevent unauthorized personnel from entering the testing site.

(1) The only people you are to treat as authorized persons are employees being tested, BATs, STTs, and other alcohol testing site workers, DERs, employee representatives authorized by the employer (*e.g.,* on the basis of employer policy or labor-management agreement), and DOT agency representatives.

(2) You must ensure that all persons are under the supervision of a BAT or STT at all times when permitted into the site.

(3) You may remove any person who obstructs, interferes with, or causes unnecessary delay in the testing process.

(b) As the BAT or STT, you must not allow any person other than you, the employee, or a DOT agency representative to actually witness the testing process (see §§ 40.241–40.255).

(c) If you are operating an alcohol testing site, you must ensure that when an EBT or ASD is not being used for testing, you store it in a secure place.

(d) If you are operating an alcohol testing site, you must ensure that no one other than BATs or other employees of the site have access to the site when an EBT is unsecured.

(e) As a BAT or STT, to avoid distraction that could compromise security, you are limited to conducting an alcohol test for only one employee at a time.

(1) When an EBT screening test on an employee indicates an alcohol

concentration of 0.02 or higher, and the same EBT will be used for the confirmation test, you are not allowed to use the EBT for a test on another employee before completing the confirmation test on the first employee.

(2) As a BAT who will conduct both the screening and the confirmation test, you are to complete the entire screening and confirmation process on one employee before starting the screening process on another employee.

(3) You are not allowed to leave the alcohol testing site while the testing process for a given employee is in progress, except to notify a supervisor or contact a DER for assistance in the case an employee or other person who obstructs, interferes with, or unnecessarily delays the testing process.

§ 40.225 What form is used for an alcohol test?

(a) The DOT Alcohol Testing Form (ATF) must be used for every DOT alcohol test. The ATF must be a three-part carbonless manifold form. The ATF is found in Appendix G to this part. You may view this form on the ODAPC web site (http://www.dot.gov/ost/dapc).

(b) As an employer in the DOT alcohol testing program, you are not permitted to modify or revise the ATF except as follows:

(1) You may include other information needed for billing purposes, outside the boundaries of the form.

(2) You may use a ATF directly generated by an EBT which omits the space for affixing a separate printed result to the ATF, provided the EBT prints the result directly on the ATF.

(3) You may use an ATF that has the employer's name, address, and telephone number preprinted. In addition, a C/TPA's name, address, and telephone number may be included, to assist with negative results.

(4) You may use an ATF in which all pages are printed on white paper. The white pages must have either clearly discernible borders in the specified color for each page or designation statements for each copy in the specified color.

(5) As a BAT or STT, you may add, on the ''Remarks'' line of the ATF, the name of the DOT agency under whose authority the test occurred.

(6) As a BAT or STT, you may use a ATF that has your name, address, and telephone number preprinted, but under no circumstances can your signature be preprinted.

(c) As an employer, you may use an equivalent foreign-language version of the ATF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and BAT/STT understand and can use the form in that language.

§ 40.227 May employers use the ATF for non-DOT tests, or non-DOT forms for DOT tests?

(a) No, as an employer, BAT, or STT, you are prohibited from using the ATF for non-DOT alcohol tests. You are also prohibited from using non-DOT forms for DOT alcohol tests. Doing either subjects you to enforcement action under DOT agency regulations.

(b) If the STT or BAT, either by mistake, or as the only means to conduct a test under difficult circumstances (*e.g.,* post-accident test with insufficient time to obtain the ATF), uses a non-DOT form for a DOT test, the use of a non-DOT form does not, in and of itself, require the employer or service agent to cancel the test. However, in order for the test to be considered valid, a signed statement must be obtained from the STT or BAT in accordance with § 40.271(b) .

§ 40.229 What devices are used to conduct alcohol screening tests?

EBTs and ASDs on the NHTSA conforming products lists (CPL) for evidential and non-evidential devices are the only devices you are allowed to use to conduct alcohol screening tests under this part. An ASD can be used only for screening tests for alcohol, and may not be used for confirmation tests.

§ 40.231 What devices are used to conduct alcohol confirmation tests?

(a) EBTs on the NHTSA CPL for evidential devices that meet the requirements of paragraph (b) of this section are the only devices you may use to conduct alcohol confirmation tests under this part. Note that, among devices on the CPL for EBTs, only those devices listed without an asterisk (*) are authorized for use in confirmation testing in the DOT alcohol testing program.

(b) To conduct a confirmation test, you must use an EBT that has the following capabilities:

(1) Provides a printed triplicate result (or three consecutive identical copies of a result) of each breath test;

(2) Assigns a unique number to each completed test, which the BAT and employee can read before each test and which is printed on each copy of the result;

(3) Prints, on each copy of the result, the manufacturer's name for the device, its serial number, and the time of the test;

(4) Distinguishes alcohol from acetone at the 0.02 alcohol concentration level;

(5) Tests an air blank; and

(6) Performs an external calibration check.

§ 40.233 What are the requirements for proper use and care of EBTs?

(a) As an EBT manufacturer, you must submit, for NHTSA approval, a quality assurance plan (QAP) for your EBT before NHTSA places the EBT on the CPL.

(1) Your QAP must specify the methods used to perform external calibration checks on the EBT, the tolerances within which the EBT is regarded as being in proper calibration, and the intervals at which these checks must be performed. In designating these intervals, your QAP must take into account factors like frequency of use, environmental conditions (*e.g.,* temperature, humidity, altitude) and type of operation (*e.g.,* stationary or mobile).

(2) Your QAP must also specify the inspection, maintenance, and calibration requirements and intervals for the EBT.

(b) As the manufacturer, you must include, with each EBT, instructions for its use and care consistent with the QAP.

(c) As the user of the EBT (*e.g.,* employer, service agent), you must do the following:

(1) You must follow the manufacturer's instructions (see paragraph (b) of this section), including performance of external calibration checks at the intervals the instructions specify.

(2) In conducting external calibration checks, you must use only calibration devices appearing on NHTSA's CPL for ''Calibrating Units for Breath Alcohol Tests.''

(3) If an EBT fails an external check of calibration, you must take the EBT out of service. You may not use the EBT again for DOT alcohol testing until it is repaired and passes an external calibration check.

(4) You must maintain records of the inspection, maintenance, and calibration of EBTs as provided in § 40.333(a)(2) .

(5) You must ensure that inspection, maintenance, and calibration of the EBT are performed by its manufacturer or a maintenance representative certified either by the manufacturer or by a state health agency or other appropriate state agency.

§ 40.235 What are the requirements for proper use and care of ASDs?

(a) As an ASD manufacturer, you must submit, for NHTSA approval, a QAP for your ASD before NHTSA places the ASD on the CPL. Your QAP must

specify the methods used for quality control checks, temperatures at which the ASD must be stored and used, the shelf life of the device, and environmental conditions (*e.g.,* temperature, altitude, humidity) that may affect the ASD's performance.

(b) As a manufacturer, you must include with each ASD instructions for its use and care consistent with the QAP. The instructions must include directions on the proper use of the ASD, and, where applicable the time within which the device must be read, and the manner in which the reading is made.

(c) As the user of the ADS (*e.g.,* employer, STT), you must follow the QAP instructions.

(d) You are not permitted to use an ASD that does not pass the specified quality control checks or that has passed its expiration date.

(e) As an employer, with respect to breath ASDs, you must also follow the device use and care requirements of § 40.233 .

Subpart L—Alcohol Screening Tests

§ 40.241 What are the first steps in any alcohol screening test?

As the BAT or STT you will take the following steps to begin all alcohol screening tests, regardless of the type of testing device you are using:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's worksite, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test.

(b) Ensure that, when the employee enters the alcohol testing site, you begin the alcohol testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT drug test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

(2) If the employee needs medical attention (*e.g.,* an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to conduct a test.

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employer individual) or a Federal, state, or local government (*e.g.,* a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name but is not required to include your picture, address, or telephone number.

(e) Explain the testing procedure to the employee, including showing the employee the instructions on the back of the ATF.

(f) Complete Step 1 of the ATF.

(g) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the ''Remarks'' line of the ATF and immediately notify the DER. This is a refusal to test.

§ 40.243 What is the procedure for an alcohol screening test using an EBT or non-evidential breath ASD?

As the BAT or STT, you must take the following steps:

(a) Select, or allow the employee to select, an individually wrapped or sealed mouthpiece from the testing materials.

(b) Open the individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) Instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(d) Show the employee the displayed test result.

(e) If the device is one that prints the test number, testing device name and serial number, time, and result directly onto the ATF, you must check to ensure that the information has been printed correctly onto the ATF.

(f) If the device is one that prints the test number, testing device name and serial number, time and result, but on a separate printout rather than directly onto the ATF, you must affix the printout of the information to the designated space on the ATF with tamper-evident tape or use a self-adhesive label that is tamper-evident.

(g) If the device is one that does not print the test number, testing device name and serial number, time, and result, or it is a device not being used with a printer, you must record this information in Step 3 of the ATF.

§ 40.245 What is the procedure for an alcohol screening test using a saliva ASD?

As the STT, you must take the following steps:

(a) Check the expiration date on the device and show it to the employee. You may not use the device after its expiration date.

(b) Open an individually wrapped or sealed package containing the device in the presence of the employee.

(c) Offer the employee the opportunity to use the device. If the employee uses it, you must instruct the employee to insert it into his or her mouth and use it in a manner described by the device's manufacturer.

(d) If the employee chooses not to use the device, or in all cases in which a new test is necessary because the device did not activate (see paragraph (g) of this section), you must insert the device into the employee's mouth and gather saliva in the manner described by the device's manufacturer. You must wear single-use examination or similar gloves while doing so and change them following each test.

(e) When the device is removed from the employee's mouth, you must follow the manufacturer's instructions regarding necessary next steps in ensuring that the device has activated.

(f)(1) If you were unable to successfully follow the procedures of paragraphs (c) through (e) of this section (*e.g.,* the device breaks, you drop the device on the floor), you must discard the device and conduct a new test using a new device.

(2) The new device you use must be one that has been under your control or that of the employer before the test.

(3) You must note on the ''Remarks'' line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(4) You must offer the employee the choice of using the device or having you use it unless the employee, in the opinion of the STT or BAT, was responsible (*e.g.,* the employee dropped the device) for the new test needing to be conducted.

(5) If you are unable to successfully follow the procedures of paragraphs (c)

through (e) of this section on the new test, you must end the collection and put an explanation on the ''Remarks'' line of the ATF.

(6) You must then direct the employee to take a new test immediately, using an EBT for the screening test.

(g) If you are able to successfully follow the procedures of paragraphs (c)–(e) of this section, but the device does not activate, you must discard the device and conduct a new test, in the same manner as provided in paragraph (f) of this section. In this case, you must place the device into the employee's mouth to collect saliva for the new test.

(h) You must read the result displayed on the device no sooner than the device's manufacturer instructs. In all cases the result displayed must be read within 15 minutes of the test. You must then show the device and its reading to the employee and enter the result on the ATF.

(i) You must never re-use devices, swabs, gloves or other materials used in saliva testing.

(j) You must note the fact that you used a saliva ASD in Step 3 of the ATF.

§ 40.247 What procedures does the BAT or STT follow after a screening test result?

(a) If the test result is an alcohol concentration of less than 0.02, as the BAT or STT, you must do the following:

(1) Sign and date Step 3 of the ATF; and

(2) Transmit the result to the DER in a confidential manner, as provided in § 40.255 .

(b) If the test result is an alcohol concentration of 0.02 or higher, as the BAT or STT, you must direct the employee to take a confirmation test.

(1) If you are the BAT who will conduct the confirmation test, you must then conduct the test using the procedures beginning at § 40.251 .

(2) If you are not the BAT who will conduct the confirmation test, direct the employee to take a confirmation test, sign and date Step 3 of the ATF, and give the employee Copy 2 of the ATF.

(3) If the confirmation test will be performed at a different site from the screening test, you must take the following additional steps:

(i) Advise the employee not to eat, drink, put anything (*e.g.,* cigarette, chewing gum) into his or her mouth, or belch;

(ii) Tell the employee the reason for the waiting period required by § 40.251(a) (*i.e.,* to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) Explain that following your instructions concerning the waiting period is to the employee's benefit;

(iv) Explain that the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed;

(v) Note on the ''Remarks'' line of the ATF that the waiting period instructions were provided;

(vi) Instruct the person accompanying the employee to carry a copy of the ATF to the BAT who will perform the confirmation test; and

(vii) Ensure that you or another BAT, STT, or employer representative observe the employee as he or she is transported to the confirmation testing site. You must direct the employee not to attempt to drive a motor vehicle to the confirmation testing site.

(c) If the screening test is invalid, you must, as the BAT or STT, tell the employee the test is cancelled and note the problem on the ''Remarks'' line of the ATF. If practicable, repeat the testing process (see § 40. 271).

Subpart M—Alcohol Confirmation Tests

§ 40.251 What are the first steps in an alcohol confirmation test?

As the BAT for an alcohol confirmation test, you must follow these steps to begin the confirmation test process:

(a) You must carry out a requirement for a waiting period before the confirmation test, by taking the following steps:

(1) You must ensure that the waiting period lasts at least 15 minutes, starting with the completion of the screening test. After the waiting period has elapsed, you should begin the confirmation test as soon as possible, but not more than 30 minutes after the completion of the screening test.

(i) If the confirmation test is taking place at a different location from the screening test (see § 40.247(b)(3)) the time of transit between sites counts toward the waiting period if the STT or BAT who conducted the screening test provided the waiting period instructions.

(ii) If you cannot verify, through review of the ATF, that waiting period instructions were provided, then you must carry out the waiting period requirement.

(iii) You or another BAT or STT, or an employer representative, must observe the employee during the waiting period.

(2) Concerning the waiting period, you must tell the employee:

(i) Not to eat, drink, put anything (*e.g.,* cigarette, chewing gum) into his or her mouth, or belch;

(ii) The reason for the waiting period (*i.e.,* to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) That following your instructions concerning the waiting period is to the employee's benefit; and

(iv) That the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed.

(3) If you become aware that the employee has not followed the instructions, you must note this on the ''Remarks'' line of the ATF.

(b) If you did not conduct the screening test for the employee, you must require positive identification of the employee, explain the confirmation procedures, and use a new ATF. You must note on the ''Remarks'' line of the ATF that a different BAT or STT conducted the screening test.

(c) Complete Step 1 of the ATF.

(d) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the ''Remarks'' line of the ATF and immediately notify the DER. This is a refusal to test.

(e) Even if more than 30 minutes have passed since the screening test result was obtained, you must begin the confirmation test procedures in § 40.253, not another screening test.

(f) You must note on the ''Remarks'' line of the ATF the time that elapsed between the two events, and if the confirmation test could not begin within 30 minutes of the screening test, the reason why.

(g) Beginning the confirmation test procedures after the 30 minutes have elapsed does not invalidate the screening or confirmation tests, but it may constitute a regulatory violation subject to DOT agency sanction.

§ 40.253 What are the procedures for conducting an alcohol confirmation test?

As the BAT conducting an alcohol confirmation test, you must follow these steps in order to complete the confirmation test process:

(a) In the presence of the employee, you must conduct an air blank on the EBT you are using before beginning the confirmation test and show the reading to the employee.

(1) If the reading is 0.00, the test may proceed. If the reading is greater than 0.00, you must conduct another air blank.

(2) If the reading on the second air blank is 0.00, the test may proceed. If the reading is greater than 0.00, you must take the EBT out of service.

(3) If you take an EBT out of service for this reason, no one may use it for testing until the EBT is found to be

within tolerance limits on an external check of calibration.

(4) You must proceed with the test of the employee using another EBT, if one is available.

(b) You must open a new individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) You must ensure that you and the employee read the sequential test number displayed on the EBT.

(d) You must instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(e) You must show the employee the result displayed on the EBT.

(f) You must show the employee the result and unique test number that the EBT prints out either directly onto the ATF or onto a separate printout.

(g) If the EBT provides a separate printout of the result, you must attach the printout to the designated space on the ATF with tamper-evident tape, or use a self-adhesive label that is tamper-evident.

§ 40.255 What happens next after the alcohol confirmation test result?

(a) After the EBT has printed the result of an alcohol confirmation test, you must, as the BAT, take the following additional steps:

(1) Sign and date Step 3 of the ATF.

(2) If the alcohol confirmation test result is lower than 0.02, nothing further is required of the employee. As the BAT, you must sign and date Step 3 of the ATF.

(3) If the alcohol confirmation test result is 0.02 or higher, direct the employee to sign and date Step 4 of the ATF. If the employee does not do so, you must note this on the ''Remarks'' line of the ATF. However, this is not considered a refusal to test.

(4) If the test is invalid, tell the employee the test is cancelled and note the problem on the ''Remarks'' line of the ATF. If practicable, conduct a re-test. (see § 40.271).

(5) Immediately transmit the result directly to the DER in a confidential manner.

(i) You may transmit the results using Copy 1 of the ATF, in person, by telephone, or by electronic means. In any case, you must immediately notify the DER of any result of 0.02 or greater by any means (*e.g.,* telephone or secure fax machine) that ensures the result is immediately received by the DER. You must not transmit these results through C/TPAs or other service agents.

(ii) If you do not make the initial transmission in writing, you must follow up the initial transmission with Copy 1 of the ATF.

(b) As an employer, you must take the following steps with respect to the receipt and storage of alcohol test result information:

(1) If you receive any test results that are not in writing (*e.g.,* by telephone or electronic means), you must establish a mechanism to establish the identity of the BAT sending you the results.

(2) You must store all test result information in a way that protects confidentiality.

Subpart N—Problems in Alcohol Testing

§ 40.261 What is a refusal to take an alcohol test, and what are the consequences?

(a) As an employee, you are considered to have refused to take an alcohol test if you:

(1) Fail to appear for any test within a reasonable time, as determined by the employer, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by C/TPA (see § 40.241(b)(1));

(2) Fail to remain at the testing site until the testing process is complete;

(3) Fail to attempt to provide a saliva or breath specimen, as applicable, for any test required by this part or DOT agency regulations;

(4) Fail to provide a sufficient breath specimen, and the physician has determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.265(c));

(5) Fail to undergo a medical examination or evaluation, as directed by the employer as part of the insufficient breath procedures outlined at § 40.265(c);

(6) Fail to sign the certification at Step 2 of the ATF (see § 40.241(b)(7)); or

(7) Fail to cooperate with any part of the testing process.

(b) As an employee, if you refuse to take an alcohol test, you incur the same consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(c) As a BAT or an STT, or as the physician evaluating a ''shy lung'' situation, when an employee refuses to test as provided in paragraph (a) of this section, you must terminate the portion of the testing process in which you are involved, document the refusal on the ATF (or in a separate document which you cause to be attached to the form), immediately notify the DER by any means (*e.g.,* telephone or secure fax machine) that ensures the refusal notification is immediately received. You must make this notification directly to the DER (not using a C/TPA as an intermediary).

(d) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for such a refusal.

§ 40.263 What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol screening test?

(a) As the STT, you must take the following steps if an employee is unable to provide sufficient saliva to complete a test on a saliva screening device (*e.g.*, the employee does not provide sufficient saliva to activate the device).

(1) You must conduct a new screening test using a new screening device.

(2) If the employee refuses to make the attempt to complete the new test, you must discontinue testing, note the fact on the ''Remarks'' line of the ATF, and immediately notify the DER. This is a refusal to test.

(3) If the employee has not provided a sufficient amount of saliva to complete the new test, you must note the fact on the ''Remarks'' line of the ATF and immediately notify the DER.

(b) As the DER, when the STT informs you that the employee has not provided a sufficient amount of saliva (see paragraph (a)(3) of this section), you must immediately arrange to administer an alcohol test to the employee using an EBT or other breath testing device.

§ 40.265 What happens when an employee is unable to provide a sufficient amount of breath for an alcohol test?

(a) If an employee does not provide a sufficient amount of breath to permit a valid breath test, you must take the steps listed in this section.

(b) As the BAT or STT, you must instruct the employee to attempt again to provide a sufficient amount of breath and about the proper way to do so.

(1) If the employee refuses to make the attempt, you must discontinue the test, note the fact on the ''Remarks'' line of the ATF, and immediately notify the DER. This is a refusal to test.

(2) If the employee again attempts and fails to provide a sufficient amount of breath, you may provide another opportunity to the employee to do so if you believe that there is a strong likelihood that it could result in providing a sufficient amount of breath.

(3) When the employee's attempts under paragraph (b)(2) of this section

have failed to produce a sufficient amount of breath, you must note the fact on the ''Remarks'' line of the ATF and immediately notify the DER.

(4) If you are using an EBT that has the capability of operating manually, you may attempt to conduct the test in manual mode.

(5) If you are qualified to use a saliva ASD and you are in the screening test stage, you may change to a saliva ASD only to complete the screening test.

(c) As the employer, when the BAT or STT informs you that the employee has not provided a sufficient amount of breath, you must direct the employee to obtain, within five days, an evaluation from a licensed physician who is acceptable to you and who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.

(1) You are required to provide the physician who will conduct the evaluation with the following information and instructions:

(i) That the employee was required to take a DOT breath alcohol test, but was unable to provide a sufficient amount of breath to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required alcohol test;

(iii) That the physician must provide you with a signed statement of his or her conclusions; and

(iv) That the physician, in his or her reasonable medical judgment, must base those conclusions on one of the following determinations:

(A) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. The physician must not include in the signed statement detailed information on the employee's medical condition. In this case, the test is cancelled.

(B) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. This constitutes a refusal to test.

(C) For purposes of paragraphs (c)(1)(iv)(A) and (B) of this section, a medical condition includes an ascertainable physiological condition (*e.g.*, a respiratory system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of ''situational anxiety'' or hyperventilation.

(2) As the physician making the evaluation, after making your determination, you must provide a written statement of your conclusions and the basis for them to the DER directly (and not through a C/TPA acting as an itermediary). You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(3) Upon receipt of the report from the examining physician, as the DER you must immediately inform the employee and take appropriate action based upon your DOT agency regulations.

§ 40.267 What problems always cause an alcohol test to be cancelled?

As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are ''fatal flaws.'' You must inform the DER that the test was cancelled and must be treated as if the test never occurred. These problems are:

(a) In the case of a screening test conducted on a saliva ASD:

(1) The STT reads the result either sooner than or later than the time allotted by the manufacturer (see § 40.245(h));

(2) The device does not activate (see § 40.245(g)); or

(3) The device is used for a test after the expiration date printed on its package (see § 40.245(a)).

(b) In the case of a screening or confirmation test conducted on an EBT, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result (see § 40.253(c), (e) and (f)).

(c) In the case of a confirmation test:

(1) The BAT conducts the confirmation test before the end of the minimum 15-minute waiting period (see § 40.251(a)(1));

(2) The BAT does not conduct an air blank before the confirmation test (see § 40.253(a));

(3) There is not a 0.00 result on the air blank conducted before the confirmation test (see § 40.253(a)(1) and (2));

(4) The EBT does not print the result (see § 40.253(f)); or

(5) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this case, every result of 0.02 or above obtained on the EBT since the last valid external calibration check is cancelled (see § 40.233(a)(1) and (d)).

§ 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?

As a BAT or STT, or employer, you must cancel an alcohol test if any of the following problems occur, unless they are corrected. These are ''correctable flaws.'' These problems are:

(a) The BAT or STT does not sign the ATF (see § § 40.247(a)(1) and 40.255(a)(1)).

(b) The BAT or STT fails to note on the ''Remarks'' line of the ATF that the employee has not signed the ATF after the result is obtained (see § 40.255(a)(2)).

(c) The BAT or STT uses a non-DOT form for the test (see § 40.225(a)).

§ 40.271 How are alcohol testing problems corrected?

(a) As a BAT or STT, you have the responsibility of trying to complete successfully an alcohol test for each employee.

(1) If, during or shortly after the testing process, you become aware of any event that will cause the test to be cancelled (see § 40.267), you must try to correct the problem promptly, if practicable. You may repeat the testing process as part of this effort.

(2) If repeating the testing process is necessary, you must begin a new test as soon as possible. You must use a new ATF, a new sequential test number, and, if needed, a new ASD and/or a new EBT. It is permissible to use additional technical capabilities of the EBT (*e.g.*, manual operation) if you have been trained to do so in accordance with § 40.213(c) .

(3) If repeating the testing process is necessary, you are not limited in the number of attempts to complete the test, provided that the employee is making a good faith effort to comply with the testing process.

(4) If another testing device is not available for the new test at the testing site, you must immediately notify the DER and advise the DER that the test could not be completed. As the DER who receives this information, you must make all reasonable efforts to ensure that the test is conducted at another testing site as soon as possible.

(b) If, as an STT, BAT, employer or other service agent administering the testing process, you become aware of a ''correctable flaw'' (see § 40.269) that has not already been corrected, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a signed statement that it is true and accurate. For example, suppose you are a BAT and you forgot to make a notation on the ''Remarks'' line of the ATF that

the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification after the result was obtained, and that your signed statement is true and accurate.

(2) If the problem is the use of a non-DOT form, you must, as the person responsible for the use of the incorrect form, certify in writing that the incorrect form contains all the information needed for a valid DOT alcohol test. You must also provide a signed statement that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control, and the steps you have taken to prevent future use of non-DOT forms for DOT tests. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(c) If you cannot correct the problem, you must cancel the test.

§ 40.273 What is the effect of a cancelled alcohol test?

(a) A cancelled alcohol test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a test result that is 0.02 or greater (*e.g.*, removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test in a situation where an employee needs a test result that is below 0.02 (*e.g.*, in the case of a return-to-duty or follow-up test to authorize the employee to perform safety-sensitive functions).

(3) As an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other provisions of this part.

(b) A cancelled test does not count toward compliance with DOT requirements, such as a minimum random testing rate.

(c) When a test must be cancelled, if you are the BAT, STT, or other person who determines that the cancellation is necessary, you must inform the affected DER within 48 hours of the cancellation.

(d) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (*i.e.*, a test under company authority).

§ 40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?

(a) As an STT, BAT, employer, or a service agent administering the testing process, you must document any errors in the testing process of which you become aware, even if they are not ''fatal flaws'' or ''correctable flaws'' listed in this subpart. Decisions about the ultimate impact of these errors will be determined by administrative or legal proceedings, subject to the limitation of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test. For example, it is inconsistent with this part to cancel a test based on a minor administrative mistake (*e.g.*, the omission of the employee's middle initial) or an error that does not affect employee protections under this part. Nor does the failure of an employee to sign in Step 4 of the ATF result in the cancellation of the test. Nor is a test to be cancelled on the basis of a claim by an employee that he or she was improperly selected for testing.

(c) As an employer, these errors, even though not sufficient to cancel an alcohol test result, may subject you to enforcement action under DOT agency regulations.

§ 40.277 Are alcohol tests other than saliva or breath permitted under these regulations?

No, other types of alcohol tests (*e,g.,* blood and urine) are not authorized for testing done under this part. Only saliva or breath for screening tests and breath for confirmation tests using approved devices are permitted.

Subpart O—Substance Abuse Professionals and the Return-to-Duty Process

§ 40.281 Who is qualified to act as a SAP?

To be permitted to act as a SAP in the DOT drug testing program, you must meet each of the requirements of this section:

(a) *Credentials.* You must have one of the following credentials:

(1) You are a licensed physician (Doctor of Medicine or Osteopathy);

(2) You are a licensed or certified social worker;

(3) You are a licensed or certified psychologist;

(4) You are a licensed or certified employee assistance professional; or

(5) You are a drug and alcohol counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC) or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC).

(b) *Basic knowledge.* You must be knowledgeable in the following areas:

(1) You must be knowledgeable about and have clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

(2) You must be knowledgeable about the SAP function as it relates to employer interests in safety-sensitive duties.

(3) You must be knowledgeable about this part, the DOT agency regulations applicable to the employers for whom you evaluate employees, and the DOT SAP Guidelines, and you keep current on any changes to these materials. These documents are available from ODAPC (Department of Transportation, 400 7th Street, SW., Room 10403, Washington DC, 20590 (202–366–3784), or on the ODAPC web site (http://www.dot.gov/ost/dapc).

(c) *Qualification training.* You must receive qualification training meeting the requirements of this paragraph (c).

(1) Qualification training must provide instruction on the following subjects:

(i) Background, rationale, and coverage of the Department's drug and alcohol testing program;

(ii) 49 CFR Part 40 and DOT agency drug and alcohol testing rules;

(iii) Key DOT drug testing requirements, including collections, laboratory testing, MRO review, and problems in drug testing;

(iv) Key DOT alcohol testing requirements, including the testing process, the role of BATs and STTs, and problems in alcohol tests;

(v) SAP qualifications and prohibitions;

(vi) The role of the SAP in the return-to-duty process, including the initial employee evaluation, referrals for education and/or treatment, the follow-up evaluation, continuing treatment recommendations, and the follow-up testing plan;

(vii) SAP consultation and communication with employers, MROs, and treatment providers;

(viii) Reporting and recordkeeping requirements;

(ix) Issues that SAPs confront in carrying out their duties under the program.

(2) Following your completion of qualification training under paragraph (c)(1) of this section, you must satisfactorily complete an examination administered by a nationally-recognized professional or training organization. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(3) The following is the schedule for qualification training you must meet:

(i) If you became a SAP before August 1, 2001, you must meet the qualification training requirement no later than December 31, 2003.

(ii) If you become a SAP between August 1, 2001, and December 31, 2003, you must meet the qualification training requirement no later than December 31, 2003.

(iii) If you become a SAP on or after January 1, 2004, you must meet the qualification training requirement before you begin to perform SAP functions.

(d) *Continuing education.* During each three-year period from the date on which you satisfactorily complete the examination under paragraph (c)(2) of this section, you must complete continuing education consisting of at least 12 professional development hours (*e.g.*, CEUs) relevant to performing SAP functions.

(1) This continuing education must include material concerning new technologies, interpretations, recent guidance, rule changes, and other information about developments in SAP practice, pertaining to the DOT program, since the time you met the qualification training requirements of this section.

(2) Your continuing education activities must include documentable assessment tools to assist you in determining whether you have adequately learned the material.

(e) *Documentation.* You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or contemplating using your services.

§ 40.283 How does a certification organization obtain recognition for its members as SAPs?

(a) If you represent a certification organization that wants DOT to authorize its certified drug and alcohol counselors to be added to § 40.281(a)(5), you may submit a written petition to DOT requesting a review of your petition for inclusion.

(b) You must obtain the National Commission for Certifying Agencies (NCCA) accreditation before DOT will act on your petition.

(c) You must also meet the minimum requirements of Appendix E to this part before DOT will act on your petition.

§ 40.285 When is a SAP evaluation required?

(a) As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.

(b) For purposes of this subpart, a verified positive DOT drug test result, a DOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater, a refusal to test (including by adulterating or substituting a urine specimen) or any other violation of the prohibition on the use of alcohol or drugs under a DOT agency regulation constitutes a DOT drug and alcohol regulation violation.

§ 40.287 What information is an employer required to provide concerning SAP services to an employee who has a DOT drug and alcohol regulation violation?

As an employer, you must provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation a listing of SAPs readily available to the employee and acceptable to you, with names, addresses, and telephone numbers. You cannot charge the employee any fee for compiling or providing this list. You may provide this list yourself or through a C/TPA or other service agent.

§ 40.289 Are employers required to provide SAP and treatment services to employees?

(a) As an employer, you are not required to provide a SAP evaluation or any subsequent recommended education or treatment for an employee who has violated a DOT drug and alcohol regulation.

(b) However, if you offer that employee an opportunity to return to a DOT safety-sensitive duty following a violation, you must, before the employee again performs that duty, ensure that the employee receives an evaluation by a SAP meeting the requirements of § 40.281 and that the employee successfully complies with the SAP's evaluation recommendations.

(c) Payment for SAP evaluations and services is left for employers and employees to decide and may be governed by existing management-labor agreements and health care benefits.

§ 40.291 What is the role of the SAP in the evaluation, referral, and treatment process of an employee who has violated DOT agency drug and alcohol testing regulations?

(a) As a SAP, you are charged with:

(1) Making a face-to-face clinical assessment and evaluation to determine what assistance is needed by the employee to resolve problems associated with alcohol and/or drug use;

(2) Referring the employee to an appropriate education and/or treatment program;

(3) Conducting a face-to-face follow-up evaluation to determine if the employee has actively participated in the education and/or treatment program and has demonstrated successful compliance with the initial assessment and evaluation recommendations;

(4) Providing the DER with a follow-up drug and/or alcohol testing plan for the employee; and

(5) Providing the employee and employer with recommendations for continuing education and/or treatment.

(b) As a SAP, you are not an advocate for the employer or employee. Your function is to protect the public interest in safety by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare.

§ 40.293 What is the SAP's function in conducting the initial evaluation of an employee?

As a SAP, for every employee who comes to you following a DOT drug and alcohol regulation violation, you must accomplish the following:

(a) Provide a comprehensive face-to-face assessment and clinical evaluation.

(b) Recommend a course of education and/or treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty.

(1) You must make such a recommendation for every individual who has violated a DOT drug and alcohol regulation.

(2) You must make a recommendation for education and/or treatment that will, to the greatest extent possible, protect public safety in the event that the employee returns to the performance of safety-sensitive functions.

(c) Appropriate education may include, but is not limited to, self-help groups (*e.g.,* Alcoholics Anonymous) and community lectures, where attendance can be independently verified, and bona fide drug and alcohol education courses.

(d) Appropriate treatment may include, but is not limited to, in-patient hospitalization, partial in-patient treatment, out-patient counseling programs, and aftercare.

(e) You must provide a written report directly to the DER highlighting your specific recommendations for assistance (see § 40.311(c)).

(f) For purposes of your role in the evaluation process, you must assume that a verified positive test result has conclusively established that the employee committed a DOT drug and

alcohol regulation violation. You must not take into consideration in any way, as a factor in determining what your recommendation will be, any of the following:

(1) A claim by the employee that the test was unjustified or inaccurate;

(2) Statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation (*e.g.,* related to assertions of use of hemp oil, ''medical marijuana'' use, ''contact positives,'' poppy seed ingestion, job stress); or

(3) Personal opinions you may have about the justification or rationale for drug and alcohol testing.

(g) In the course of gathering information for purposes of your evaluation in the case of a drug-related violation, you may consult with the MRO. As the MRO, you are required to cooperate with the SAP and provide available information the SAP requests. It is not necessary to obtain the consent of the employee to provide this information.

§ 40.295 May employees or employers seek a second SAP evaluation if they disagree with the first SAP's recommendations?

(a) As an employee with a DOT drug and alcohol regulation violation, when you have been evaluated by a SAP, you must not seek a second SAP's evaluation in order to obtain another recommendation.

(b) As an employer, you must not seek a second SAP's evaluation if the employee has already been evaluated by a qualified SAP. If the employee, contrary to paragraph (a) of this section, has obtained a second SAP evaluation, as an employer you may not rely on it for any purpose under this part.

§ 40.297 Does anyone have the authority to change a SAP's initial evaluation?

(a) Except as provided in paragraph (b) of this section, no one (*e.g.,* an employer, employee, a managed-care provider, any service agent) may change in any way the SAP's evaluation or recommendations for assistance. For example, a third party is not permitted to make more or less stringent a SAP's recommendation by changing the SAP's evaluation or seeking another SAP's evaluation.

(b) The SAP who made the initial evaluation may modify his or her initial evaluation and recommendations based on new or additional information (*e.g.,* from an education or treatment program).

§ 40.299 What is the SAP's role and what are the limits on a SAP's discretion in referring employees for education and treatment?

(a) As a SAP, upon your determination of the best recommendation for assistance, you will serve as a referral source to assist the employee's entry into a education and/or treatment program.

(b) To prevent the appearance of a conflict of interest, you must not refer an employee requiring assistance to your private practice or to a person or organization from which you receive payment or to a person or organization in which you have a financial interest. You are precluded from making referrals to entities with which you are financially associated.

(c) There are four exceptions to the prohibitions contained in paragraph (b) of this section. You may refer an employee to any of the following providers of assistance, regardless of your relationship with them:

(1) A public agency (*e.g.,* treatment facility) operated by a state, county, or municipality;

(2) The employer or a person or organization under contract to the employer to provide alcohol or drug treatment and/or education services (*e.g.,* the employer's contracted treatment provider);

(3) The sole source of therapeutically appropriate treatment under the employee's health insurance program (*e.g.,* the single substance abuse in-patient treatment program made available by the employee's insurance coverage plan); or

(4) The sole source of therapeutically appropriate treatment reasonably available to the employee (*e.g.,* the only treatment facility or education program reasonably located within the general commuting area).

§ 40.301 What is the SAP's function in the follow-up evaluation of an employee?

(a) As a SAP, after you have prescribed assistance under § 40.293, you must re-evaluate the employee to determine if the employee has successfully carried out your education and/or treatment recommendations.

(1) This is your way to gauge for the employer the employee's ability to demonstrate successful compliance with the education and/or treatment plan.

(2) Your evaluation may serve as one of the reasons the employer decides to return the employee to safety-sensitive duty.

(b) As the SAP making the follow-up evaluation determination, you must:

(1) Confer with or obtain appropriate documentation from the appropriate education and/or treatment program professionals where the employee was referred; and

(2) Conduct a face-to-face clinical interview with the employee to determine if the employee demonstrates successful compliance with your initial evaluation recommendations.

(c) (1) If the employee has demonstrated successful compliance, you must provide a written report directly to the DER highlighting your clinical determination that the employee has done so with your initial evaluation recommendation (see § 40.311(d)).

(2) You may determine that an employee has successfully demonstrated compliance even though the employee has not yet completed the full regimen of education and/or treatment you recommended or needs additional asssitance. For example, if the employee has successfully completed the 30-day in-patient program you prescribed, you may make a ''successful compliance'' determination even though you conclude that the employee has not yet completed the out-patient counseling you recommended or should continue in an aftercare program.

(d)(1) As the SAP, if you believe, as a result of the follow-up evaluation, that the employee has not demonstrated successful compliance with your recommendations, you must provide written notice directly to the DER (see § 40.311(e)).

(2) As an employer who receives the SAP's written notice that the employee has not successfully complied with the SAP's recommendations, you must not return the employee to the performance of safety-sensitive duties.

(3) As the SAP, you may conduct additional follow-up evaluation(s) if the employer determines that doing so is consistent with the employee's progress as you have reported it and with the employer's policy and/or labor-management agreements.

(4) As the employer, following a SAP report that the employee has not demonstrated successful compliance, you may take personnel action consistent with your policy and/or labor-management agreements.

§ 40.303 What happens if the SAP believes the employee needs additional treatment, aftercare, or support group services even after the employee returns to safety-sensitive duties?

(a) As a SAP, if you believe that ongoing services (in addition to follow-up tests) are needed to assist an employee to maintain sobriety or abstinence from drug use after the

employee resumes the performance of safety-sensitive duties, you must provide recommendations for these services in your follow-up evaluation report (see § 40.311(d)(10)).

(b) As an employer receiving a recommendation for these services from a SAP, you may, as part of a return-to-duty agreement with the employee, require the employee to participate in the recommended services. You may monitor and document the employee's participation in the recommended services. You may also make use of SAP and employee assistance program (EAP) services in assisting and monitoring employees' compliance with SAP recommendations. Nothing in this section permits an employer to fail to carry out its obligations with respect to follow-up testing (see § 40.309).

(c) As an employee, you are obligated to comply with the SAP's recommendations for these services. If you fail or refuse to do so, you may be subject to disciplinary action by your employer.

§ 40.305 How does the return-to-duty process conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

(b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

(c) As a SAP or MRO, you must not make a ''fitness for duty'' determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than you, who must decide whether to put the employee back to work in a safety-sensitive position.

§ 40.307 What is the SAP's function in prescribing the employee's follow-up tests?

(a) As a SAP, for each employee who has committed a DOT drug or alcohol regulation violation, and who seeks to resume the performance of safety-sensitive functions, you must establish a written follow-up testing plan. You do not establish this plan until after you determine that the employee has successfully complied with your recommendations for education and/or treatment.

(b) You must present a copy of this plan directly to the DER (see § 40.311(d)(9)).

(c) You are the sole determiner of the number and frequency of follow-up tests and whether these tests will be for drugs, alcohol, or both, unless otherwise directed by the appropriate DOT agency regulation. For example, if the employee had a positive drug test, but your evaluation or the treatment program professionals determined that the employee had an alcohol problem as well, you should require that the employee have follow-up tests for both drugs and alcohol.

(d) However, you must, at a minimum, direct that the employee be subject to six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee's return to safety-sensitive functions.

(1) You may require a greater number of follow-up tests during the first 12-month period of safety-sensitive duty (*e.g.*, you may require one test a month during the 12-month period; you may require two tests per month during the first 6-month period and one test per month during the final 6-month period).

(2) You may also require follow-up tests during the 48 months of safety-sensitive duty following this first 12-month period.

(3) You are not to establish the actual dates for the follow-up tests you prescribe. The decision on specific dates to test is the employer's.

(4) As the employer, you must not impose additional testing requirements (*e.g.*, under company authority) on the employee that go beyond the SAP's follow-up testing plan.

(e) The requirements of the SAP's follow-up testing plan ''follow the employee'' to subsequent employers or through breaks in service.

Example 1 to Paragraph (e): The employee returns to duty with Employer A. Two months afterward, after completing the first two of six follow-up tests required by the SAP's plan, the employee quits his job with Employer A and begins to work in a similar position for Employer B. The employee remains obligated to complete the four additional tests during the next 10 months of safety-sensitive duty, and Employer B is responsible for ensuring that the employee does so. Employer B learns of this obligation through the inquiry it makes under § 40.25.

Example 2 to Paragraph (e): The employee returns to duty with Employer A. Three months later, after the employee completes the first two of six follow-up tests required by the SAP's plan, Employer A lays the employee off for economic or seasonal employment reasons. Four months later, Employer A recalls the employee. Employer A must ensure that the employee completes the remaining four follow-up tests during the next nine months.

(f) As the SAP, you may modify the determinations you have made concerning follow-up tests. For example, even if you recommended follow-up testing beyond the first 12-months, you can terminate the testing requirement at any time after the first year of testing. You must not, however, modify the requirement that the employee take at least six follow-up tests within the first 12 months after returning to the performance of safety-sensitive functions.

§ 40.309 What are the employer's responsibilities with respect to the SAP's directions for follow-up tests?

(a) As the employer, you must carry out the SAP's follow-up testing requirements. You may not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP.

(b) You should schedule follow-up tests on dates of your own choosing, but you must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the employee is given no advance notice.

(c) You cannot substitute any other tests (*e.g.*, those carried out under the random testing program) conducted on the employee for this follow-up testing requirement.

(d) You cannot count a follow-up test that has been cancelled as a completed test. A cancelled follow-up test must be recollected.

§ 40.311 What are the requirements concerning SAP reports?

(a) As the SAP conducting the required evaluations, you must send the written reports required by this section in writing directly to the DER and not to a third party or entity for forwarding to the DER (except as provided in § 40.355(e)). You may, however, forward the document simultaneously to the DER and to a C/TPA.

(b) As an employer, you must ensure that you receive SAP written reports directly from the SAP performing the evaluation and that no third party or

entity changed the SAP's report in any way.

(c) The SAP's written report, following an initial evaluation that determines what level of assistance is needed to address the employee's drug and/or alcohol problems, must be on the SAP's own letterhead (and not the letterhead of another service agent) signed and dated by the SAP, and must contain the following delineated items:

(1) Employee's name and SSN;

(2) Employer's name and address;

(3) Reason for the assessment (specific violation of DOT regulations and violation date);

(4) Date(s) of the assessment;

(5) SAP's education and/or treatment recommendation; and

(6) SAP's telephone number.

(d) The SAP's written report concerning a follow-up evaluation that determines the employee has demonstrated successful compliance must be on the SAP's own letterhead (and not the letterhead of another service agent), signed by the SAP and dated, and must contain the following items:

(1) Employee's name and SSN;

(2) Employer's name and address;

(3) Reason for the initial assessment (specific violation of DOT regulations and violation date);

(4) Date(s) of the initial assessment and synopsis of the treatment plan;

(5) Name of practice(s) or service(s) providing the recommended education and/or treatment;

(6) Inclusive dates of employee's program participation;

(7) Clinical characterization of employee's program participation;

(8) SAP's clinical determination as to whether the employee has demonstrated successful compliance;

(9) Follow-up testing plan;

(10) Employee's continuing care needs with specific treatment, aftercare, and/or support group services recommendations; and

(11) SAP's telephone number.

(e) The SAP's written report concerning a follow-up evaluation that determines the employee has not demonstrated successful compliance must be on the SAP's own letterhead (and not the letterhead of another service agent), signed by the SAP and dated, and must contain the following items:

(1) Employee's name and SSN;

(2) Employer's name and address;

(3) Reason for the initial assessment (specific DOT violation and date);

(4) Date(s) of initial assessment and synopsis of treatment plan;

(5) Name of practice(s) or service(s) providing the recommended education and/or treatment;

(6) Inclusive dates of employee's program participation;

(7) Clinical characterization of employee's program participation;

(8) Date(s) of the first follow-up evaluation;

(9) Date(s) of any further follow-up evaluation the SAP has scheduled;

(10) SAP's clinical reasons for determining that the employee has not demonstrated successful compliance; and

(11) SAP's telephone number.

(f) As a SAP, you must also provide these written reports directly to the employee if the employee has no current employer and to the gaining DOT regulated employer in the event the employee obtains another transportation industry safety-sensitive position.

(g) As a SAP, you are to maintain copies of your reports to employers for 5 years, and your employee clinical records in accordance with Federal, state, and local laws regarding record maintenance, confidentiality, and release of information. You must make these records available, on request, to DOT agency representatives (*e.g.*, inspectors conducting an audit or safety investigation) and representatives of the NTSB in an accident investigation.

(h) As an employer, you must maintain your reports from SAPs for 5 years from the date you received them.

§ 40.313 Where is other information on SAP functions and the return-to-duty process found in this regulation?

You can find other information on the role and functions of SAPs in the following sections of this part:

§ 40.3—Definition.

§ 40.347—Service agent assistance with SAP-required follow-up testing.

§ 40.355—Transmission of SAP reports.

§ 40.329(c)—Making SAP reports available to employees on request.

Appendix E to Part 40—SAP Equivalency Requirements for Certification Organizations.

Subpart P—Confidentiality and Release of Information

§ 40.321 What is the general confidentiality rule for drug and alcohol test information?

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

(a) A ''third party'' is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(b) ''Specific written consent'' means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. ''Blanket releases,'' in which an employee agrees to a release of a category of information (*e.g.,* all test results) or to release information to a category of parties (*e.g.,* other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

§ 40.323 May program participants release drug or alcohol test information in connection with legal proceedings?

(a) As an employer, you may release information pertaining to an employee's drug or alcohol test without the employee's consent in certain legal proceedings.

(1) These proceedings include a lawsuit (*e.g.,* a wrongful discharge action), grievance (*e.g.,* an arbitration concerning disciplinary action taken by the employer), or administrative proceeding (*e.g.,* an unemployment compensation hearing) brought by, or on behalf of, an employee and resulting from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results).

(2) These proceedings also include a criminal or civil action resulting from an employee's performance of safety-sensitive duties, in which a court of competent jurisdiction determines that the drug or alcohol test information sought is relevant to the case and issues an order directing the employer to produce the information. For example, in personal injury litigation following a truck or bus collision, the court could determine that a post-accident drug test result of an employee is relevant to determining whether the driver or the driver's employer was negligent. The employer is authorized to respond to the court's order to produce the records.

(b) In such a proceeding, you may release the information to the decisionmaker in the proceeding (*e.g.,* the court in a lawsuit). You may release the information only with a binding stipulation that the decisionmaker to whom it is released will make it available only to parties to the proceeding.

(c) If you are a service agent, and the employer requests its employee's drug or alcohol testing information from you to use in a legal proceeding as authorized in paragraph (a) of this

section (*e.g.,* the laboratory's data package), you must provide the requested information to the employer.

(d) As an employer or service agent, you must immediately notify the employee in writing of any information you release under this section.

§ 40.325 [Reserved]

§ 40.327 When must the MRO report medical information gathered in the verification process?

(a) As the MRO, you must, except as provided in paragraph (c) of this section, report drug test results and medical information you learned as part of the verification process to third parties without the employee's consent if you determine, in your reasonable medical judgment, that:

(1) The information is likely to result in the employee being determined to be medically unqualified under an applicable DOT agency regulation; or

(2) The information indicates that continued performance by the employee of his or her safety-sensitive function is likely to pose a significant safety risk.

(b) The third parties to whom you are authorized to provide information by this section include the employer, a physician or other health care provider responsible for determining the medical qualifications of the employee under an applicable DOT agency safety regulation, a SAP evaluating the employee as part of the return to duty process (see § 40.293(g)), a DOT agency, or the National Transportation Safety Board in the course of an accident investigation.

(c) If the law of a foreign country (*e.g.,* Canada) prohibits you from providing medical information to the employer, you may comply with that prohibition.

§ 40.329 What information must laboratories, MROs, and other service agents release to employees?

(a) As an MRO or service agent you must provide, within 10 business days of receiving a written request from an employee, copies of any records pertaining to the employee's use of alcohol and/or drugs, including records of the employee's DOT-mandated drug and/or alcohol tests. You may charge no more than the cost of preparation and reproduction for copies of these records.

(b) As a laboratory, you must provide, within 10 business days of receiving a written request from an employee, and made through the MRO, the records relating to the results of the employee's drug test (*i.e.,* laboratory report and data package). You may charge no more than the cost of preparation and reproduction for copies of these records.

(c) As a SAP, you must make available to an employee, on request, a copy of all SAP reports (see § 40.311).

§ 40.331 To what additional parties must employers and service agents release information?

As an employer or service agent you must release information under the following circumstances:

(a) If you receive a specific, written consent from an employee authorizing the release of information about that employee's drug or alcohol tests to an identified person, you must provide the information to the identified person. For example, as an employer, when you receive a written request from a former employee to provide information to a subsequent employer, you must do so. In providing the information, you must comply with the terms of the employee's consent.

(b) If you are an employer, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations.

(c) If you are a service agent, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations.

(d) If requested by the National Transportation Safety Board as part of an accident investigation, you must provide information concerning post-accident tests administered after the accident.

(e) If requested by a Federal, state or local safety agency with regulatory authority over you or the employee, you must provide drug and alcohol test records concerning the employee.

(f) Except as otherwise provided in this part, as a laboratory you must not release or provide a specimen or a part of a specimen to a requesting party, without first obtaining written consent from ODAPC. If a party seeks a court order directing you to release a specimen or part of a specimen contrary to any provision of this part, you must take necessary legal steps to contest the issuance of the order (*e.g.,* seek to quash a subpoena, citing the requirements of § 40.13). This part does not require you to disobey a court order, however.

§ 40.333 What records must employers keep?

(a) As an employer, you must keep the following records for the following periods of time:

(1) You must keep the following records for five years:

(i) Records of employee alcohol test results indicating an alcohol concentration of 0.02 or greater;

(ii) Records of employee verified positive drug test results;

(iii) Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);

(iv) SAP reports; and

(v) All follow-up tests and schedules for follow-up tests.

(2) You must keep records for three years of information obtained from previous employers under § 40.25 concerning drug and alcohol test results of employees.

(3) You must keep records of the inspection, maintenance, and calibration of EBTs, for two years.

(4) You must keep records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02 for one year.

(b) You do not have to keep records related to a program requirement that does not apply to you (*e.g.*, a maritime employer who does not have a DOT-mandated random alcohol testing program need not maintain random alcohol testing records).

(c) You must maintain the records in a location with controlled access.

(d) A service agent may maintain these records for you. However, you must ensure that you can produce these records at your principal place of business in the time required by the DOT agency. For example, as a motor carrier, when an FMCSA inspector requests your records, you must ensure that you can provide them within two working days.

Subpart Q—Roles and Responsibilities of Service Agents

§ 40.341 Must service agents comply with DOT drug and alcohol testing requirements?

(a) As a service agent, the services you provide to transportation employers must meet the requirements of this part

and the DOT agency drug and alcohol testing regulations.

(b) If you do not comply, DOT may take action under the Public Interest Exclusions procedures of this part (see Subpart R of this part) or applicable provisions of other DOT agency regulations.

§ 40.343 What tasks may a service agent perform for an employer?

As a service agent, you may perform for employers the tasks needed to comply with DOT agency drug and alcohol testing regulations, subject to the requirements and limitations of this part.

§ 40.345 In what circumstances may a C/TPA act as an intermediary in the transmission of drug and alcohol testing information to employers?

(a) As a C/TPA or other service agent, you may act as an intermediary in the transmission of drug and alcohol testing information in the circumstances specified in this section only if the employer chooses to have you do so. Each employer makes the decision about whether to receive some or all of this information from you, acting as an intermediary, rather than directly from the service agent who originates the information (*e.g.*, an MRO or BAT).

(b) The specific provisions of this part concerning which you may act as an intermediary are listed in Appendix F to this part. These are the only situations in which you may act as an intermediary. You are prohibited from doing so in all other situations.

(c) In every case, you must ensure that, in transmitting information to employers, you meet all requirements (*e.g.*, concerning confidentiality and timing) that would apply if the service agent originating the information (*e.g.*, an MRO or collector) sent the information directly to the employer. For example, if you transmit drug testing results from MROs to DERs, you must transmit each drug test result to the DER in compliance with the MRO requirements set forth in § 40.167 .

§ 40.347 What functions may C/TPAs perform with respect to administering testing?

As a C/TPA, except as otherwise specified in this part, you may perform the following functions for employers concerning random selection and other selections for testing.

(a) You may operate random testing programs for employers and may assist (*i.e.*, through contracting with laboratories or collection sites, conducting collections) employers with other types of testing (*e.g.*, pre-employment, post-accident, reasonable suspicion, return-to-duty, and follow-up).

(b) You may combine employees from more than one employer or one transportation industry in a random pool if permitted by all the DOT agency drug and alcohol testing regulations involved.

(1) If you combine employees from more than one transportation industry, you must ensure that the random testing rate is at least equal to the highest rate required by each DOT agency.

(2) Employees not covered by DOT agency regulations may not be part of the same random pool with DOT covered employees.

(c) You may assist employers in ensuring that follow-up testing is conducted in accordance with the plan established by the SAP. However, neither you nor the employer are permitted to randomly select employees from a ''follow-up pool'' for follow-up testing.

§ 40.349 What records may a service agent receive and maintain?

(a) Except where otherwise specified in this part, as a service agent you may receive and maintain all records concerning DOT drug and alcohol testing programs, including positive, negative, and refusal to test individual test results. You do not need the employee's consent to receive and maintain these records.

(b) You may maintain all information needed for operating a drug/alcohol program (*e.g.*, CCFs, ATFs, names of employees in random pools, random selection lists, copies of notices to employers of selected employees) on behalf of an employer.

(c) If a service agent originating drug or alcohol testing information, such as an MRO or BAT, sends the information directly to the DER, he or she may also provide the information simultaneously to you, as a C/TPA or other service agent who maintains this information for the employer.

(d) If you are serving as an intermediary in transmitting information that is required to be provided to the employer, you must ensure that it reaches the employer in the same time periods required elsewhere in this part.

(e) You must ensure that you can make available to the employer within two days any information the employer is asked to produce by a DOT agency representative.

(f) On request of an employer, you must, at any time on the request of an employer, transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it. You are not required to obtain employee consent for this transfer. You must not charge more than your reasonable administrative costs for conducting this transfer. You may not charge a fee for the release of these records.

(g) If you are planning to go out of business or your organization will be bought by or merged with another organization, you must immediately notify all employers and offer to transfer all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it. You are not required to obtain employee consent for this transfer. You must not charge more than your reasonable administrative costs for conducting this transfer. You may not charge a fee for the release of these records.

§ 40.351 What confidentiality requirements apply to service agents?

Except where otherwise specified in this part, as a service agent the following confidentiality requirements apply to you:

(a) When you receive or maintain confidential information about employees (*e.g.*, individual test results), you must follow the same confidentiality regulations as the employer with respect to the use and release of this information.

(b) You must follow all confidentiality and records retention requirements applicable to employers.

(c) You may not provide individual test results or other confidential information to another employer without a specific, written consent from the employee. For example, suppose you are a C/TPA that has employers X and Y as clients. Employee Jones works for X, and you maintain Jones' drug and alcohol test for X. Jones wants to change jobs and work for Y. You may not inform Y of the result of a test conducted for X without having a specific, written consent from Jones. Likewise, you may not provide this information to employer Z, who is not a C/TPA member, without this consent.

(d) You must not use blanket consent forms authorizing the release of employee testing information.

(e) You must establish adequate confidentiality and security measures to ensure that confidential employee records are not available to unauthorized persons. This includes protecting the physical security of

records, access controls, and computer security measures to safeguard confidential data in electronic data bases.

§ 40.353 What principles govern the interaction between MROs and other service agents?

As a service agent other than an MRO (*e.g.,* a C/TPA), the following principles govern your interaction with MROs:

(a) You may provide MRO services to employers, directly or through contract, if you meet all applicable provisions of this part.

(b) If you employ or contract for an MRO, the MRO must perform duties independently and confidentially. When you have a relationship with an MRO, you must structure the relationship to ensure that this independence and confidentiality are not compromised. Specific means (including both physical and operational measures, as appropriate) to separate MRO functions and other service agent functions are essential.

(c) Only your staff who are actually under the day-to-day supervision and control of an MRO with respect to MRO functions may perform these functions. This does not mean that those staff may not perform other functions at other times. However, the designation of your staff to perform MRO functions under MRO supervision must be limited and not used as a subterfuge to circumvent confidentiality and other requirements of this part and DOT agency regulations. You must ensure that MRO staff operate under controls sufficient to ensure that the independence and confidentiality of the MRO process are not compromised.

(d) Like other MROs, an MRO you employ or contract with must personally conduct verification interviews with employees and must personally make all verification decisions. Consequently, your staff cannot perform these functions.

§ 40.355 What limitations apply to the activities of service agents?

As a service agent, you are subject to the following limitations concerning your activities in the DOT drug and alcohol testing program.

(a) You must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO, and SAP services).

(b) You must not act as an intermediary in the transmission of drug test results from the laboratory to the MRO. That is, the laboratory may not send results to you, with you in turn sending them to the MRO for verification. For example, a practice in which the laboratory transmits results to your computer system, and you then assign the results to a particular MRO, is not permitted.

(c) You must not transmit drug test results directly from the laboratory to the employer (by electronic or other means) or to a service agent who forwards them to the employer. All confirmed laboratory results must be processed by the MRO before they are released to any other party.

(d) You must not act as an intermediary in the transmission of alcohol test results of 0.02 or higher from the STT or BAT to the DER.

(e) Except as provided in paragraph (f) of this section, you must not act as an intermediary in the transmission of individual SAP reports to the actual employer. That is, the SAP may not send such reports to you, with you in turn sending them to the actual employer. However, you may maintain individual SAP summary reports and follow-up testing plans after they are sent to the DER, and the SAP may transmit such reports to you simultaneously with sending them to the DER.

(f) As an exception to paragraph (e) of this section, you may act as an intermediary in the transmission of SAP report from the SAP to an owner-operator or other self-employed individual.

(g) Except as provided in paragraph (h) of this section, you must not make decisions to test an employee based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria. These are duties the actual employer cannot delegate to a C/TPA. You may, however, provide advice and information to employers regarding these testing issues and how the employer should schedule required testing.

(h) As an exception to paragraph (g) of this section, you may make decisions to test an employee based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria with respect to an owner-operator or other self-employed individual.

(i) Except as provided in paragraph (j) of this section, you must not make a determination that an employee has refused a drug or alcohol test. This is a non-delegable duty of the actual employer. You may, however, provide advice and information to employers regarding refusal-to-test issues.

(j) As an exception to paragraph (i) of this section, you may make a determination that an employee has refused a drug or alcohol test, if:

(1) You are authorized by a DOT agency regulation to do so, you schedule a required test for an owner-operator or other self-employed individual, and the individual fails to appear for the test without a legitimate reason; or

(2) As an MRO, you determine that an individual has refused to test on the basis of adulteration or substitution.

(k) You must not act as a DER. For example, while you may be responsible for transmitting information to the employer about test results, you must not act on behalf of the employer in actions to remove employees from safety-sensitive duties.

(l) In transmitting documents to laboratories, you must ensure that you send to the laboratory that conducts testing only the laboratory copy of the CCF. You must not transmit other copies of the CCF or any ATFs to the laboratory.

(m) You must not impose conditions or requirements on employers that DOT regulations do not authorize. For example, as a C/TPA serving employers in the pipeline or motor carrier industry, you must not require employers to have provisions in their DOT plans that RSPA or FMCSA regulations do not require.

(n) You must not intentionally delay the transmission of drug or alcohol testing-related documents concerning actions you have performed, because of a payment dispute or other reasons.

Example 1 to Paragraph (n): A laboratory that has tested a specimen must not delay transmitting the documentation of the test result to an MRO because of a billing or payment dispute with the MRO or a C/TPA.

Example 2 to Paragraph (n): An MRO or SAP who has interviewed an employee must not delay sending a verified test result or SAP report to the employer because of such a dispute with the employer or employee.

Example 3 to Paragraph (n): A collector who has performed a urine specimen collection must not delay sending the drug specimen and CCF to the laboratory because of a payment or other dispute with the laboratory or a C/TPA.

Example 4 to Paragraph (n): A BAT who has conducted an alcohol test must not delay sending test result information to an employer or C/TPA because of a payment or other dispute with the employer or C/TPA.

(o) While you must follow the DOT agency regulations, the actual employer remains accountable to DOT for compliance, and your failure to implement any aspect of the program as required in this part and other applicable DOT agency regulations makes the employer subject to enforcement action by the Department.

Subpart R—Public Interest Exclusions

§ 40.361 What is the purpose of a public interest exclusion (PIE)?

(a) To protect the public interest, including protecting transportation employers and employees from serious noncompliance with DOT drug and alcohol testing rules, the Department's policy is to ensure that employers conduct business only with responsible service agents.

(b) The Department therefore uses PIEs to exclude from participation in DOT's drug and alcohol testing program any service agent who, by serious noncompliance with this part or other DOT agency drug and alcohol testing regulations, has shown that it is not currently acting in a responsible manner.

(c) A PIE is a serious action that the Department takes only to protect the public interest. We intend to use PIEs only to remedy situations of serious noncompliance. PIEs are not used for the purpose of punishment.

(d) Nothing in this subpart precludes a DOT agency or the Inspector General from taking other action authorized by its regulations with respect to service agents or employers that violate its regulations.

§ 40.363 On what basis may the Department issue a PIE?

(a) If you are a service agent, the Department may issue a PIE concerning you if we determine that you have failed or refused to provide drug or alcohol testing services consistent with the requirements of this part or a DOT agency drug and alcohol regulation.

(b) The Department also may issue a PIE if you have failed to cooperate with DOT agency representatives concerning inspections, complaint investigations, compliance and enforcement reviews, or requests for documents and other information about compliance with this part or DOT agency drug and alcohol regulations.

§ 40.365 What is the Department's policy concerning starting a PIE proceeding?

(a) It is the Department's policy to start a PIE proceeding only in cases of serious, uncorrected noncompliance with the provisions of this part, affecting such matters as safety, the outcomes of test results, privacy and confidentiality, due process and fairness for employees, the honesty and integrity of the testing program, and cooperation with or provision of information to DOT agency representatives.

(b) The following are examples of the kinds of serious noncompliance that, as a matter of policy, the Department views as appropriate grounds for starting a PIE proceeding. These examples are not intended to be an exhaustive or exclusive list of the grounds for starting a PIE proceeding. We intend them to illustrate the level of seriousness that the Department believes supports starting a PIE proceeding. The examples follow:

(1) For an MRO, verifying tests positive without interviewing the employees as required by this part or providing MRO services without meeting the qualifications for an MRO required by this part;

(2) For a laboratory, refusing to provide information to the Department, an employer, or an employee as required by this part; failing or refusing to conduct a validity testing program when required by this part; or a pattern or practice of testing errors that result in the cancellation of tests. (As a general matter of policy, the Department does not intend to initiate a PIE proceeding concerning a laboratory with respect to matters on which HHS initiates certification actions under its laboratory guidelines.);

(3) For a collector, a pattern or practice of directly observing collections when doing so is unauthorized, or failing or refusing to directly observe collections when doing so is mandatory;

(4) For collectors, BATs, or STTs, a pattern or practice of using forms, testing equipment, or collection kits that do not meet the standards in this part;

(5) For a collector, BAT, or STT, a pattern or practice of ''fatal flaws'' or other significant uncorrected errors in the collection process;

(6) For a laboratory, MRO or C/TPA, failing or refusing to report tests results as required by this part or DOT agency regulations;

(7) For a laboratory, falsifying, concealing, or destroying documentation concerning any part of the drug testing process, including, but not limited to, documents in a ''litigation package'';

(8) For SAPs, providing SAP services while not meeting SAP qualifications required by this part or performing evaluations without face-to-face interviews;

(9) For any service agent, maintaining a relationship with another party that constitutes a conflict of interest under this part (*e.g.,* a laboratory that derives a financial benefit from having an employer use a specific MRO);

(10) For any service agent, representing falsely that the service agent or its activities is approved or certified by the Department or a DOT agency;

(11) For any service agent, disclosing an employee's test result information to any party this part or a DOT agency regulation does not authorize, including by obtaining a ''blanket'' consent from employees or by creating a data base from which employers or others can retrieve an employee's DOT test results without the specific consent of the employee;

(12) For any service agent, interfering or attempting to interfere with the ability of an MRO to communicate with the Department, or retaliating against an MRO for communicating with the Department;

(13) For any service agent, directing or recommending that an employer fail or refuse to implement any provision of this part; or

(14) With respect to noncompliance with a DOT agency regulation, conduct that affects important provisions of Department-wide concern (*e.g.,* failure to properly conduct the selection process for random testing).

§ 40.367 Who initiates a PIE proceeding?

The following DOT officials may initiate a PIE proceeding:

(a) The drug and alcohol program manager of a DOT agency;

(b) An official of ODAPC, other than the Director; or

(c) The designee of any of these officials.

§ 40.369 What is the discretion of an initiating official in starting a PIE proceeding?

(a) Initiating officials have broad discretion in deciding whether to start a PIE proceeding.

(b) In exercising this discretion, the initiating official must consider the Department's policy regarding the seriousness of the service agent's conduct (see § 40.365) and all information he or she has obtained to this point concerning the facts of the case. The initiating official may also consider the availability of the resources needed to pursue a PIE proceeding.

(c) A decision not to initiate a PIE proceeding does not necessarily mean that the Department regards a service agent as being in compliance or that the Department may not use other applicable remedies in a situation of noncompliance.

§ 40.371 On what information does an initiating official rely in deciding whether to start a PIE proceeding?

(a) An initiating official may rely on credible information from any source as the basis for starting a PIE proceeding.

(b) Before sending a correction notice (see § 40.373), the initiating official informally contacts the service agent to determine if there is any information that may affect the initiating official's

determination about whether it is necessary to send a correction notice. The initiating official may take any information resulting from this contact into account in determining whether to proceed under this subpart.

§ 40.373 Before starting a PIE proceeding, does the initiating official give the service agent an opportunity to correct problems?

(a) If you are a service agent, the initiating official must send you a correction notice before starting a PIE proceeding.

(b) The correction notice identifies the specific areas in which you must come into compliance in order to avoid being subject to a PIE proceeding.

(c) If you make and document changes needed to come into compliance in the areas listed in the correction notice to the satisfaction of the initiating official within 60 days of the date you receive the notice, the initiating official does not start a PIE proceeding. The initiating official may conduct appropriate fact finding to verify that you have made and maintained satisfactory corrections. When he or she is satisfied that you are in compliance, the initiating official sends you a notice that the matter is concluded.

§ 40.375 How does the initiating official start a PIE proceeding?

(a) As a service agent, if your compliance matter is not correctable (see § 40.373(a)), or if have not resolved compliance matters as provided in § 40.373(c), the initiating official starts a PIE proceeding by sending you a notice of proposed exclusion (NOPE). The NOPE contains the initiating official's recommendations concerning the issuance of a PIE, but it is not a decision by the Department to issue a PIE.

(b) The NOPE includes the following information:

(1) A statement that the initiating official is recommending that the Department issue a PIE concerning you;

(2) The factual basis for the initiating official's belief that you are not providing drug and/or alcohol testing services to DOT-regulated employers consistent with the requirements of this part or are in serious noncompliance with a DOT agency drug and alcohol regulation;

(3) The factual basis for the initiating official's belief that your noncompliance has not been or cannot be corrected;

(4) The initiating official's recommendation for the scope of the PIE;

(5) The initiating official's recommendation for the duration of the PIE; and

(6) A statement that you may contest the issuance of the proposed PIE, as provided in § 40.379.

(c) The initiating official sends a copy of the NOPE to the ODAPC Director at the same time he or she sends the NOPE to you.

§ 40.377 Who decides whether to issue a PIE?

(a) The ODAPC Director, or his or her designee, decides whether to issue a PIE. If a designee is acting as the decisionmaker, all references in this subpart to the Director refer to the designee.

(b) To ensure his or her impartiality, the Director plays no role in the initiating official's determination about whether to start a PIE proceeding.

(c) There is a ''firewall'' between the initiating official and the Director. This means that the initiating official and the Director are prohibited from having any discussion, contact, or exchange of information with one another about the matter, except for documents and discussions that are part of the record of the proceeding.

§ 40.379 How do you contest the issuance of a PIE?

(a) If you receive a NOPE, you may contest the issuance of the PIE.

(b) If you want to contest the proposed PIE, you must provide the Director information and argument in opposition to the proposed PIE in writing, in person, and/or through a representative. To contest the proposed PIE, you must take one or more of the steps listed in this paragraph (b) within 30 days after you receive the NOPE.

(1) You may request that the Director dismiss the proposed PIE without further proceedings, on the basis that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(2) You may present written information and arguments, consistent with the provisions of § 40.381, contesting the proposed PIE.

(3) You may arrange with the Director for an informal meeting to present your information and arguments.

(c) If you do not take any of the actions listed in paragraph (b) of this section within 30 days after you receive the NOPE, the matter proceeds as an uncontested case. In this event, the Director makes his or her decision based on the record provided by the initiating official (*i.e.,* the NOPE and any supporting information or testimony) and any additional information the Director obtains.

§ 40.381 What information do you present to contest the proposed issuance of a PIE?

(a) As a service agent who wants to contest a proposed PIE, you must present at least the following information to the Director:

(1) Specific facts that contradict the statements contained in the NOPE (see § 40.375(b)(2) and (3)). A general denial is insufficient to raise a genuine dispute over facts material to the issuance of a PIE;

(2) Identification of any existing, proposed or prior PIE; and

(3) Identification of your affiliates, if any.

(b) You may provide any information and arguments you wish concerning the proposed issuance, scope and duration of the PIE (see § 40.375(b)(4) and (5)).

(c) You may provide any additional relevant information or arguments concerning any of the issues in the matter.

§ 40.383 What procedures apply if you contest the issuance of a PIE?

(a) DOT conducts PIE proceedings in a fair and informal manner. The Director may use flexible procedures to allow you to present matters in opposition. The Director is not required to follow formal rules of evidence or procedure in creating the record of the proceeding.

(b) The Director will consider any information or argument he or she determines to be relevant to the decision on the matter.

(c) You may submit any documentary evidence you want the Director to consider. In addition, if you have arranged an informal meeting with the Director, you may present witnesses and confront any person the initiating official presents as a witness against you.

(d) In cases where there are material factual issues in dispute, the Director or his or her designee may conduct additional fact-finding.

(e) If you have arranged a meeting with the Director, the Director will make a transcribed record of the meeting available to you on your request. You must pay the cost of transcribing and copying the meeting record.

§ 40.385 Who bears the burden of proof in a PIE proceeding?

(a) As the proponent of issuing a PIE, the initiating official bears the burden of proof.

(b) This burden is to demonstrate, by a preponderance of the evidence, that the service agent was in serious noncompliance with the requirements of this part for drug and/or alcohol testing-related services or with the requirements of another DOT agency drug and alcohol testing regulation.

§ 40.387 What matters does the Director decide concerning a proposed PIE?

(a) Following the service agent's response (see § 40.379(b)) or, if no response is received, after 30 days have passed from the date on which the service agent received the NOPE, the Director may take one of the following steps:

(1) In response to a request from the service agent (see § 40.379(b)(1)) or on his or her own motion, the Director may dismiss a PIE proceeding if he or she determines that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

(i) If the Director dismisses a proposed PIE under this paragraph (a), the action is closed with respect to the noncompliance alleged in the NOPE.

(ii) The Department may initiate a new PIE proceeding against you on the basis of different or subsequent conduct that is in noncompliance with this part or other DOT drug and alcohol testing rules.

(2) If the Director determines that the initiating official's submission does not have complete information needed for a decision, the Director may remand the matter to the initiating official. The initiating official may resubmit the matter to the Director when the needed information is complete. If the basis for the proposed PIE has changed, the initiating official must send an amended NOPE to the service agent.

(b) The Director makes determinations concerning the following matters in any PIE proceeding that he or she decides on the merits:

(1) Any material facts that are in dispute;

(2) Whether the facts support issuing a PIE;

(3) The scope of any PIE that is issued; and

(4) The duration of any PIE that is issued.

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

(a) The actual or potential harm that results or may result from your noncompliance;

(b) The frequency of incidents and/or duration of the noncompliance;

(c) Whether there is a pattern or prior history of noncompliance;

(d) Whether the noncompliance was pervasive within your organization, including such factors as the following:

(1) Whether and to what extent your organization planned, initiated, or carried out the noncompliance;

(2) The positions held by individuals involved in the noncompliance, and whether your principals tolerated their noncompliance; and

(3) Whether you had effective standards of conduct and control systems (both with respect to your own organization and any contractors or affiliates) at the time the noncompliance occurred;

(e) Whether you have demonstrated an appropriate compliance disposition, including such factors as the following:

(1) Whether you have accepted responsibility for the noncompliance and recognize the seriousness of the conduct that led to the cause for issuance of the PIE;

(2) Whether you have cooperated fully with the Department during the investigation. The Director may consider when the cooperation began and whether you disclosed all pertinent information known to you;

(3) Whether you have fully investigated the circumstances of the noncompliance forming the basis for the PIE and, if so, have made the result of the investigation available to the Director;

(4) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the grounds for issuance of the PIE; and

(5) Whether your organization has taken appropriate corrective actions or remedial measures, including implementing actions to prevent recurrence;

(f) With respect to noncompliance with a DOT agency regulation, the degree to which the noncompliance affects matters common to the DOT drug and alcohol testing program;

(g) Other factors appropriate to the circumstances of the case.

§ 40.391 What is the scope of a PIE?

(a) The scope of a PIE is the Department's determination about the divisions, organizational elements, types of services, affiliates, and/or individuals (including direct employees of a service agent and its contractors) to which a PIE applies.

(b) If, as a service agent, the Department issues a PIE concerning you, the PIE applies to all your divisions, organizational elements, and types of services that are involved with or affected by the noncompliance that forms the factual basis for issuing the PIE.

(c) In the NOPE (see § 40.375(b)(4)), the initiating official sets forth his or her recommendation for the scope of the PIE. The proposed scope of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(3)).

(d) In recommending and deciding the scope of the PIE, the initiating official and Director, respectively, must take into account the provisions of paragraphs (e) through (j) of this section.

(e) The pervasiveness of the noncompliance within a service agent's organization (see § 40.389(d)) is an important consideration in determining the scope of a PIE. The appropriate scope of a PIE grows broader as the pervasiveness of the noncompliance increases.

(f) The application of a PIE is not limited to the specific location or employer at which the conduct that forms the factual basis for issuing the PIE was discovered.

(g) A PIE applies to your affiliates, if the affiliate is involved with or affected by the conduct that forms the factual basis for issuing the PIE.

(h) A PIE applies to individuals who are officers, employees, directors, shareholders, partners, or other individuals associated with your organization in the following circumstances:

(1) Conduct forming any part of the factual basis of the PIE occurred in connection with the individual's performance of duties by or on behalf of your organization; or

(2) The individual knew of, had reason to know of, approved, or acquiesced in such conduct. The individual's acceptance of benefits derived from such conduct is evidence of such knowledge, acquiescence, or approval.

(i) If a contractor to your organization is solely responsible for the conduct that forms the factual basis for a PIE, the PIE does not apply to the service agent itself unless the service agent knew or should have known about the conduct and did not take action to correct it.

(j) PIEs do not apply to drug and alcohol testing that DOT does not regulate.

(k) The following examples illustrate how the Department intends the provisions of this section to work:

Example 1 to § 40.391. Service Agent P provides a variety of drug testing services. P's SAP services are involved in a serious violation of this Part 40. However, P's other

services fully comply with this part, and P's overall management did not plan or concur in the noncompliance, which in fact was contrary to P's articulated standards. Because the noncompliance was isolated in one area of the organization's activities, and did not pervade the entire organization, the scope of the PIE could be limited to SAP services.

Example 2 to § 40.391. Service Agent Q provides a similar variety of services. The conduct forming the factual basis for a PIE concerns collections for a transit authority. As in Example 1, the noncompliance is not pervasive throughout Q's organization. The PIE would apply to collections at all locations served by Q, not just the particular transit authority or not just in the state in which the transit authority is located.

Example 3 to § 40.391. Service Agent R provides a similar array of services. One or more of the following problems exists: R's activities in several areas—collections, MROs, SAPs, protecting the confidentiality of information—are involved in serious noncompliance; DOT determines that R's management knew or should have known about serious noncompliance in one or more areas, but management did not take timely corrective action; or, in response to an inquiry from DOT personnel, R's management refuses to provide information about its operations. In each of these three cases, the scope of the PIE would include all aspects of R's services.

Example 4 to § 40.391. Service Agent W provides only one kind of service (*e.g.,* laboratory or MRO services). The Department issues a PIE concerning these services. Because W only provides this one kind of service, the PIE necessarily applies to all its operations.

Example 5 to § 40.391. Service Agent X, by exercising reasonably prudent oversight of its collection contractor, should have known that the contractor was making numerous ''fatal flaws'' in tests. Alternatively, X received a correction notice pointing out these problems in its contractor's collections. In neither case did X take action to correct the problem. X, as well as the contractor, would be subject to a PIE with respect to collections.

Example 6 to § 40.391. Service Agent Y could not reasonably have known that one of its MROs was regularly failing to interview employees before verifying tests positive. When it received a correction notice, Y immediately dismissed the erring MRO. In this case, the MRO would be subject to a PIE but Y would not.

Example 7 to § 40.391. The Department issues a PIE with respect to Service Agent Z. Z provides services for DOT-regulated transportation employers, a Federal agency under the HHS-regulated Federal employee testing program, and various private businesses and public agencies that DOT does not regulate. The PIE applies only to the DOT-regulated transportation employers with respect to their DOT-mandated testing, not to the Federal agency or the other public agencies and private businesses. The PIE does not prevent the non-DOT regulated entities from continuing to use Z's services.

§ 40.393 How long does a PIE stay in effect?

(a) In the NOPE (see § 40.375(b)(5)), the initiating official proposes the duration of the PIE. The duration of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(4)).

(b) In deciding upon the duration of the PIE, the Director considers the seriousness of the conduct on which the PIE is based and the continued need to protect employers and employees from the service agent's noncompliance. The Director considers factors such as those listed in § 40.389 in making this decision.

(c) The duration of a PIE will be between one and five years, unless the Director reduces its duration under § 40.407.

§ 40.395 Can you settle a PIE proceeding?

At any time before the Director's decision, you and the initiating official can, with the Director's concurrence, settle a PIE proceeding.

§ 40.397 When does the Director make a PIE decision?

The Director makes his or her decision within 60 days of the date when the record of a PIE proceeding is complete (including any meeting with the Director and any additional fact-finding that is necessary). The Director may extend this period for good cause for additional periods of up to 30 days.

§ 40.399 How does the Department notify service agents of its decision?

If you are a service agent involved in a PIE proceeding, the Director provides you written notice as soon as he or she makes a PIE decision. The notice includes the following elements:

(a) If the decision is not to issue a PIE, a statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute.

(b) If the decision is to issue a PIE—

(1) A reference to the NOPE;

(2) A statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute;

(3) A statement of the scope of the PIE; and

(4) A statement of the duration of the PIE.

§ 40.401 How does the Department notify employers and the public about a PIE?

(a) The Department maintains a document called the ''List of Excluded Drug and Alcohol Service Agents.'' This document may be found on the Department's web site (http://www.dot.gov/ost/dapc). You may also request a copy of the document from ODAPC.

(b) When the Director issues a PIE, he or she adds to the List the name and address of the service agent, and any other persons or organizations, to whom the PIE applies and information about the scope and duration of the PIE.

(c) When a service agent ceases to be subject to a PIE, the Director removes this information from the List.

(d) The Department also publishes a **Federal Register** notice to inform the public on any occasion on which a service agent is added to or taken off the List.

§ 40.403 Must a service agent notify its clients when the Department issues a PIE?

(a) As a service agent, if the Department issues a PIE concerning you, you must notify each of your DOT-regulated employer clients, in writing, about the issuance, scope, duration, and effect of the PIE. You may meet this requirement by sending a copy of the Director's PIE decision or by a separate notice. You must send this notice to each client within three working days of receiving from the Department the notice provided for in § 40.399(b).

(b) As part of the notice you send under paragraph (a) of this section, you must offer to transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it.

§ 40.405 May the Federal courts review PIE decisions?

The Director's decision is a final administrative action of the Department. Like all final administrative actions of Federal agencies, the Director's decision is subject to judicial review under the Administrative Procedure Act (5 U.S.C. 551 *et. seq*).

§ 40.407 May a service agent ask to have a PIE reduced or terminated?

(a) Yes, as a service agent concerning whom the Department has issued a PIE, you may request that the Director terminate a PIE or reduce its duration and/or scope. This process is limited to the issues of duration and scope. It is not an appeal or reconsideration of the decision to issue the PIE.

(b) Your request must be in writing and supported with documentation.

(c) You must wait at least nine months from the date on which the Director issued the PIE to make this request.

(d) The initiating official who was the proponent of the PIE may provide information and arguments concerning your request to the Director.

(e) If the Director verifies that the sources of your noncompliance have been eliminated and that all drug or alcohol testing-related services you would provide to DOT-regulated employers will be consistent with the requirements of this part, the Director may issue a notice terminating or reducing the PIE.

§ 40.409 What does the issuance of a PIE mean to transportation employers?

(a) As an employer, you are deemed to have notice of the issuance of a PIE when it appears on the List mentioned in § 40.401(a) or the notice of the PIE appears in the **Federal Register** as provided in § 40.401(d). You should check this List to ensure that any service agents you are using or planning to use are not subject to a PIE.

(b) As an employer who is using a service agent concerning whom a PIE is issued, you must stop using the services of the service agent no later than 90 days after the Department has published the decision in the **Federal Register** or posted it on its web site. You may apply to the ODAPC Director for an extension of 30 days if you demonstrate that you cannot find a substitute service agent within 90 days.

(c) Except during the period provided in paragraph (b) of this section, you must not, as an employer, use the services of a service agent that are covered by a PIE that the Director has issued under this subpart. If you do so, you are in violation of the Department's regulations and subject to applicable DOT agency sanctions (*e.g.,* civil penalties, withholding of Federal financial assistance).

(d) You also must not obtain drug or alcohol testing services through a contractor or affiliate of the service agent to whom the PIE applies.

Example to Paragraph (d): Service Agent R was subject to a PIE with respect to SAP services. As an employer, not only must you not use R's own SAP services, but you also must not use SAP services you arrange through R, such as services provided by a subcontractor or affiliate of R or a person or organization that receives financial gain from its relationship with R.

(e) This section's prohibition on using the services of a service agent concerning which the Director has issued a PIE applies to employers in all industries subject to DOT drug and alcohol testing regulations.

Example to Paragraph (e): The initiating official for a PIE was the FAA drug and alcohol program manager, and the conduct forming the basis of the PIE pertained to the aviation industry. As a motor carrier, transit authority, pipeline, railroad, or maritime employer, you are also prohibited from using the services of the service agent involved in connection with the DOT drug and alcohol testing program.

(f) The issuance of a PIE does not result in the cancellation of drug or alcohol tests conducted using the service agent involved before the issuance of the Director's decision or up to 90 days following its publication in the **Federal Register** or posting on the Department's web site, unless otherwise specified in the Director's PIE decision or the Director grants an extension as provided in paragraph (b) of this section.

Example to Paragraph (f): The Department issues a PIE concerning Service Agent N on September 1. All tests conducted using N's services before September 1, and through November 30, are valid for all purposes under DOT drug and alcohol testing regulations, assuming they meet all other regulatory requirements.

§ 40.411 What is the role of the DOT Inspector General's office?

(a) Any person may bring concerns about waste, fraud, or abuse on the part of a service agent to the attention of the DOT Office of Inspector General.

(b) In appropriate cases, the Office of Inspector General may pursue criminal or civil remedies against a service agent.

(c) The Office of Inspector General may provide factual information to other DOT officials for use in a PIE proceeding.

§ 40.413 How are notices sent to service agents?

(a) If you are a service agent, DOT sends notices to you, including correction notices, notices of proposed exclusion, decision notices, and other notices, in any of the ways mentioned in paragraph (b) or (c) of this section.

(b) DOT may send a notice to you, your identified counsel, your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers to the last known street address, fax number, or e-mail address. DOT deems the notice to have been received by you if sent to any of these persons.

(c) DOT considers notices to be received by you—

(1) When delivered, if DOT mails the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if DOT sends the notice by fax or five days after we send it if the fax is undeliverable; or

(3) When delivered, if DOT sends the notice by e-mail or five days after DOT sends it if the e-mail is undeliverable.

Appendix A to Part 40—DOT Standards for Urine Collection Kits

The Collection Kit Contents

1. *Collection Container*

a. Single-use container, made of plastic, large enough to easily catch and hold at least 55 mL of urine voided from the body.

b. Must have graduated volume markings clearly noting levels of 45 mL and above.

c. Must have a temperature strip providing graduated temperature readings 32–38 °C/90–100 °F, that is affixed or can be affixed at a proper level on the outside of the collection container. Other methodologies (*e.g.,* temperature device built into the wall of the container) are acceptable provided the temperature measurement is accurate and such that there is no potential for contamination of the specimen.

d. Must be individually wrapped in a sealed plastic bag or shrink wrapping; or must have a peelable, sealed lid or other easily visible tamper-evident system.

e. May be made available separately at collection sites to address shy bladder situations when several voids may be required to complete the testing process.

2. *Plastic Specimen Bottles*

a. Each bottle must be large enough to hold at least 35 mL; or alternatively, they may be two distinct sizes of specimen bottles provided that the bottle designed to hold the primary specimen holds at least 35 mL of urine and the bottle designed to hold the split specimen holds at least 20 mL.

b. Must have screw-on or snap-on caps that prevent seepage of the urine from the bottles during shipment.

c. Must have markings clearly indicating the appropriate levels (30 mL for the primary specimen and 15 mL for the split) of urine that must be poured into the bottles.

d. Must be designed so that the required tamper-evident bottle seals made available on the CCF fit with no damage to the seal when the employee initials it nor with the chance that the seal overlap would conceal printed information.

e. Must be wrapped (with caps) together in a sealed plastic bag or shrink wrapping separate from the collection container; or must be wrapped (with cap) individually in sealed plastic bags or shrink wrapping; or must have peelable, sealed lid or other easily visible tamper-evident system.

f. Plastic material must be leach resistant.

3. *Leak-Resistant Plastic Bag*

a. Must have two sealable compartments or pouches which are leak-resistant; one large enough to hold two specimen bottles and the other large enough to hold the CCF paperwork.

b. The sealing methodology must be such that once the compartments are sealed, any tampering or attempts to open either compartment will be evident.

4. *Absorbent material*

Each kit must contain enough absorbent material to absorb the entire contents of both specimen bottles. Absorbent material must be designed to fit inside the leak-resistant

plastic bag pouch into which the specimen bottles are placed.

5. *Shipping Container*

a. Must be designed to adequately protect the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory (*e.g.,* standard courier box, small cardboard box, plastic container).

b. May be made available separately at collection sites rather than being part of an actual kit sent to collection sites.

c. A shipping container is not necessary if a laboratory courier hand-delivers the specimen bottles in the plastic leak-proof bags from the collection site to the laboratory.

Appendix B to Part 40—DOT Drug Testing Semi-Annual Laboratory Report

The following items are required on each report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)
Employer Identification: (name; may include billing code or ID code)
C/C/TPA Identification: (where applicable; name and address)
1. Number of specimen results reported: (total number)
   By test type:
   (a) Pre-employment testing: (number)
   (b) Post-accident testing: (number)
   (c) Random testing: (number)
   (d) Reasonable suspicion/cause testing: (number)
   (e) Return-to-duty testing: (number)
   (f) Follow-up testing: (number)
   (g) Type not noted on CCF: (number)
2. Number of specimens reported as
   (a) Negative: (total number)
   (b) Negative-dilute: (number)
3. Number of specimens reported as Rejected for Testing: (total number)
By reason:
   (a) Fatal flaw: (number)
   (b) Uncorrected flaw: (number)
4. Number of specimens reported as Positive: (total number)
   By drug:
   (a) Marijuana Metabolite: (number)
   (b) Cocaine Metabolite: (number)
   (c) Opiates:
   (1) Codeine: (number)
   (2) Morphine: (number)
   (3) 6–AM: (number)
   (d) Phencyclidine: (number)
   (e) Amphetamines: (number)
   (1) Amphetamine: (number)
   (2) Methamphetamine: (number):
5. Adulterated: (number)
6. Substituted: (number)
7. Invalid results: (number)

Appendix C to Part 40—[Reserved]

Appendix D to Part 40—Report Format: Split Specimen Failure to Reconfirm

Fax or mail to: Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 400 7th Street, SW., Room 10403, Washington, DC 20590 (fax) 202–366–3897.

1. MRO name, address, phone number, and fax number.

2. Collection site name, address, and phone number.

3. Date of collection.

4. Specimen I.D. number.

5. Laboratory accession number.

6. Primary specimen laboratory name, address, and phone number.

7. Date result reported or certified by primary laboratory.

8. Split specimen laboratory name, address, and phone number.

9. Date split specimen result reported or certified by split specimen laboratory.

10. Primary specimen results (*e.g.,* name of drug, adulterant) in the primary specimen.

11. Reason for split specimen failure-to-reconfirm result (*e.g.,* drug or adulterant not present, specimen invalid, split not collected, insufficient volume).

12. Actions taken by the MRO (*e.g.,* notified employer of failure to reconfirm and requirement for recollection).

13. Additional information explaining the reason for cancellation.

14. Name of individual submitting the report (if not the MRO).

Appendix E to Part 40—SAP Equivalency Requirements for Certification Organizations

1. *Experience:* Minimum requirements are for three years of full-time supervised experience or 6,000 hours of supervised experience as an alcoholism and/or drug abuse counselor. The supervision must be provided by a licensed or certified practitioner. Supervised experience is important if the individual is to be considered a professional in the field of alcohol and drug abuse evaluation and counseling.

2. *Education:* There exists a requirement of 270 contact hours of education and training in alcoholism and/or drug abuse or related training. These hours can take the form of formal education, in-service training, and professional development courses. Part of any professional counselor's development is participation in formal and non-formal education opportunities within the field.

3. *Continuing Education:* The certified counselor must receive at least 40–60 hours of continuing education units (CEU) during each two year period. These CEUs are important to the counselor's keeping abreast of changes and improvements in the field.

4. *Testing:* A passing score on a national test is a requirement. The test must accurately measure the application of the knowledge, skills, and abilities possessed by the counselor. The test establishes a national standard that must be met to practice.

5. *Testing Validity:* The certification examination must be reviewed by an independent authority for validity (examination reliability and relationship to the knowledge, skills, and abilities required by the counseling field). The reliability of the exam is paramount if counselor attributes are to be accurately measured. The examination passing score point must be placed at an appropriate minimal level score as gauged by statistically reliable methodology.

6. *Measurable Knowledge Base:* The certification process must be based upon measurable knowledge possessed by the applicant and verified through collateral data and testing. That level of knowledge must be of sufficient quantity to ensure a high quality of SAP evaluation and referral services.

7. *Measurable Skills Base:* The certification process must be based upon measurable skills possessed by the applicant and verified through collateral data and testing. That level of skills must be of sufficient quality to ensure a high quality of SAP evaluation and referral services.

8. *Quality Assurance Plan:* The certification agency must ensure that a means exists to determine that applicant records are verified as being true by the certification staff. This is an important check to ensure that true information is being accepted by the certifying agency.

9. *Code of Ethics:* Certified counselors must pledge to adhere to an ethical standard for practice. It must be understood that code violations could result in de-certification. These standards are vital in maintaining the integrity of practitioners. High ethical standards are required to ensure quality of client care and confidentiality of client information as well as to guard against inappropriate referral practices.

10. *Re-certification Program:* Certification is not just a one-time event. It is a continuing privilege with continuing requirements. Among these are continuing education, continuing state certification, and concomitant adherence to the code of ethics. Re-certification serves as a protector of client interests by removing poor performers from the certified practice.

11. *Fifty State Coverage:* Certification must be available to qualified counselors in all 50 states and, therefore, the test must be available to qualified applicants in all 50 states. Because many companies are multi-state operators, consistency in SAP evaluation quality and opportunities is paramount. The test need not be given in all 50 states but should be accessible to candidates from all states.

12. *National Commission for Certifying Agencies (NCCA) Accreditation:* Having NCCA accreditation is a means of demonstrating to the Department of Transportation that your certification has been reviewed by a panel of impartial experts that have determined that your examination(s) has met stringent and appropriate testing standards.

Appendix F to Part 40—Drug and Alcohol Testing Information that C/TPAs May Transmit to Employers

1. If you are a C/TPA, you may, acting as an intermediary, transmit the information in the following sections of this part to the DER for an employer, if the employer chooses to have you do so. These are the only items that you are permitted to transmit to the employer as an intermediary. The use of C/TPA intermediaries is prohibited in all other cases, such as transmission of laboratory drug test results to MROs, the transmission of medical information from MROs to employers, the transmission of SAP reports to employers, the transmission of positive alcohol test results, and the transmission of medical information from MROs to employers.

2. In every case, you must ensure that, in transmitting the information, you meet all

requirements (*e.g.,* concerning confidentiality and timing) that would apply if the party originating the information (*e.g.,* an MRO or collector) sent the information directly to the employer. For example, if you transmit MROs' drug testing results to DERs, you must transmit each drug test result to the DER in compliance with the requirements for MROs set forth in § 40.167.

Drug Testing Information

§ 40.25: Previous two years' test results
§ 40.35: Notice to collectors of contact information for DER
§ 40.61(a): Notification to DER that an employee is a ''no show'' for a drug test
§ 40.63(e): Notification to DER of a collection under direct observation
§ 40.65(b)(6) and (7) and (c)(2) and (3): Notification to DER of a refusal to provide a specimen or an insufficient specimen
§ 40.73(a)(9): Transmission of CCF copies to DER (However, MRO copy of CCF must be sent by collector directly to the MRO, not through the C/TPA.)
§ 40.111(a): Transmission of laboratory statistical report to employer
§ 40.129 (d): Report of test results to DER
§ 40.129(f)(1): Report to DER of confirmed positive test in stand-down situation
§ 40.149(b): Report to DER of changed test result
§ 40.155(a): Report to DER of dilute specimen
§§ 40.159(a)(4)(ii); 40.161(b): Reports to DER that test is cancelled
§ 40.167(b) and (c): Reports of test results to DER
§ 40.187(a), (b)(1), (c)(1), (d)(1) and (2): Reports to DER concerning the reconfirmation of tests
§ 40.191(d): Notice to DER concerning refusals to test
§ 40.193(b)(3): Notification to DER of refusal in shy bladder situation
§ 40.193(b)(4): Notification to DER of insufficient specimen
§ 40.193(b)(5): Transmission of CCF copies to DER (not to MRO)
§ 40.199: Report to DER of cancelled test and direction to DER for additional collection
§ 40.201: Report to DER of cancelled test

Alcohol Testing Information

§ 40.215: Notice to BATs and STTs of contact information for DER
§ 40.241(b)(1): Notification to DER that an employee is a ''no show'' for an alcohol test
§ 40.247(a)(2): Transmission of alcohol screening test results only when the test result is less than 0.02
§ 40.255(a)(4): Transmission of alcohol confirmation test results only when the test result is less than 0.02
§ 40.263(a)(3) and 263(b)(3): Notification of insufficient saliva and failure to provide sufficient amount of breath

Appendix G to Part 40—Alcohol Testing Form

The following form is the alcohol testing form required for use in the DOT alcohol testing program beginning August 1, 2001. Use of the form is authorized beginning January 18, 2001.

BILLING CODE 4910–62–P

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____(____)_____
DER Name **DER Phone Number**

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ _____/____/____
Signature of Employee **Date Month Day Year**

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT **DEVICE:** ☐SALIVA ☐BREATH* **15-Minute Wait:** ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # *OR* Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____
_____
_____

_____ _____
Alcohol Technician's Company **Company Street Address**

_____ _____(____)_____
(PRINT) Alcohol Technician's Name (First, M.I., Last) **Company City, State, Zip** **Phone Number**

_____ _____/____/____
Signature of Alcohol Technician **Date Month Day Year**

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ _____/____/____
Signature of Employee **Date Month Day Year**

COPY 1 – ORIGINAL – FORWARD TO THE EMPLOYER

Affix Or Print Screening Results *Here*

Affix With Tamper Evident Tap

Affix Or Print Confirmation Result *Here*

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name DER Phone Number

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ____/____/____
Signature of Employee Date Month Day Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT DEVICE: ☐SALIVA ☐BREATH* 15-Minute Wait: ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ____/____/____
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ____/____/____
Signature of Employee Date Month Day Year

COPY 2 – EMPLOYEE RETAINS

Affix Or Print Screening Results *Here*

Affix With Tamper Evident Tap

Affix Or Print Confirmation Result *Here*

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name **DER Phone Number**

D: Reason for Test: ☐**Random** ☐**Reasonable Susp** ☐**Post-Accident** ☐**Return to Duty** ☐**Follow-up** ☐**Pre-employment**

Affix Or Print Screening Results *Here*

Affix With Tamper Evident Tap

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ____/____/____
Signature of Employee **Date Month Day Year**

Affix Or Print Confirmation Results *Here*

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐**BAT** ☐ **STT** **DEVICE:** ☐ **SALIVA** ☐**BREATH*** **15-Minute Wait:** ☐ **Yes** ☐ **No**

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # *OR* Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company **Company Street Address**

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) **Company City, State, Zip** **Phone Number**

_____ ____/____/____
Signature of Alcohol Technician **Date Month Day Year**

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ____/____/____
Signature of Employee **Date Month Day Year**

COPY 3 – ALCOHOL TECHNICIAN RETAINS

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug and alcohol Policy and Compliance, Room 10403, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

BACK OF PAGES 1 and 2

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) or Screening Test Technician (STT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The BAT or STT completes the information required in this step and checks the type of device (saliva or breath) being used. After conducting the alcohol screening test, do the following (as appropriate):

Enter the information for the screening test (test number, testing device name, testing device serial number or lot number and expiration date, time of test with any device-dependent activation times, and the results), on the front of the AFT. For a breath testing device capable of printing, the information may be part of the printed record.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, e.g., 0.00, 0.02, 0.04, etc.

Affix the printed information in the space provided, in a tamper-evident manner (e.g., tape), or the device may print the results directly on the ATF. If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. The test process is complete.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An EVIDENTIAL BREATH TESTING device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided, in a tamper-evident manner (e.g., tape), or the device may print the results directly on the ATF. Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 If the employee has a breath alcohol confirmation test result of 0.02 or higher, instruct the employee to read, sign, and date the employee certification statement in STEP 4.

NOTE: If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks line in STEP 3.

Immediately notify the DER if the employee has a breath alcohol confirmation test result of 0.02 or higher.

Forward **Copy 1** to the employer. Give **Copy 2** to the employee. Retain **Copy 3** for BAT/STT records.

BACK OF PAGE 3

[FR Doc. 00–31251 Filed 12–14–00; 2:49 pm]
BILLING CODE 4910–62–C

Federal Register

Tuesday,
December 19, 2000

Part III

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, et al.

Application and Permit Information Requirements; Permit Eligibility; Definitions of Owership and Control; the Applicant/Violator System; Alternative Enforcement; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, 750, 773, 774, 775, 778, 785, 795, 817, 840, 842, 843, 846, 847, 874, 875, 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947

RIN 1029–AB94

Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are publishing final rules to amend application and permit information requirements and to redesign permit eligibility criteria under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), as amended. In this final rule, we are also amending related provisions in our regulations to incorporate changes for internal consistency. This rule fulfills our April 21, 1997, commitment to undertake new rulemaking, including public notice and comment, on ownership and control and related regulatory issues in the wake of the January 31, 1997, decision of the United States Court of Appeals for the District of Columbia Circuit.

This final rule also reflects the findings in another decision of the United States Court of Appeals. On May 28, 1999, the appeals court issued a ruling shortly after the initial close of the comment period for the proposed rule upon which this final rulemaking is based. We later found it advisable to reopen and extend the comment period in order to seek public comment on the effects of the May 1999 decision. As a result, we modified the provisions in this final rule in order to be consistent with the 1999 decision. Thus, this final rule is fully consistent with both court decisions.

EFFECTIVE DATE: January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Earl D. Bandy, Jr., Office of Surface Mining Reclamation and Enforcement, Applicant/Violator System (AVS) Office, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (859) 260–8427 or (800) 643–9748. Electronic Mail: *ebandy@osmre.gov.* Additional information concerning OSM, this rule, and related documents may be found on OSM's Internet home page (Internet address: *http://www.osmre.gov*) and on our AVS Office's Internet home page (Internet address: *http://www.avs.osmre.gov*).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Events Precipitated This Rulemaking?

The National Mining Association (NMA) and the National Wildlife Federation filed suit challenging the validity of three of OSM's rules implementing section 510(c) of SMCRA, 30 U.S.C. 1260(c). These rules are generally known as the 1988 ownership and control rule, the 1989 permit information rules and the 1989 improvidently issued permits rule, which is also referred to as the permit rescission rule. In separate decisions dated August 31, 1995, the U.S. District Court for the District of Columbia upheld the three challenged rules in their entirety. *See National Wildlife Federation* v. *Babbitt*, Nos. 88–3117, 88–3464, 88–3470 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation* v. *Babbitt*, Nos. 89–1130, 89–1167 (consolidated) (D.D.C. Aug. 31, 1995); *National Wildlife Federation* v. *Babbitt*, Nos. 89–1751, 89–1811 (consolidated) (D.D.C. Aug. 31, 1995).

NMA appealed the rulings and, on January 31, 1997, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decisions and invalidated the three sets of rules on narrow grounds. *See National Mining Association* v. *U.S. Department of the Interior*, 105 F.3d 691 (D.C. Cir. 1997) (*NMA* v. *DOI I*). The appeals court held that the clear language of section 510(c) of SMCRA, 30 U.S.C. 1260(c), authorizes regulatory authorities to deny a permit only on the basis of violations of ''any surface coal mining operation owned or controlled by the applicant.'' *NMA* v. *DOI I*, 105 F.3d at 693–94. Because OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant, the appeals court invalidated that rule in its entirety. In addition, the court held that because OSM's permit information and permit rescission rules

were ''centered on the ownership and control rule * * *, they too must fall.'' *Id.* at 696.

While the court of appeals identified only one specific defect with the 1988 and 1989 rules, it nonetheless invalidated the three sets of rules in their entirety. This had the effect of invalidating many provisions of the regulations to which the court expressed no specific objection. At the same time, nothing in the court's decision eliminated the responsibility of OSM and State regulatory authorities to implement the permit eligibility requirements of section 510(c), 30 U.S.C. 1260(c). This meant that OSM and the States faced making permitting decisions required by the Act without any regulations to flesh out the statutory directive. The appeals court's action created a gap in the regulatory program and a great deal of uncertainty among State regulatory authorities about how to continue to meet their responsibilities to determine who was eligible to receive a permit under section 510(c), 30 U.S.C. 1260(c).

Following the appeals court's decision, we made adjustments in our process for responding to regulatory authorities' requests for permitting recommendations from our Applicant/Violator System (AVS). In each case, before we offered a permitting recommendation to support the system recommendation, we determined if the recommendation would be consistent with the court's decision. In those cases where it would have been inconsistent, *i.e.,* where the recommendation would be based on the violations of those who owned or controlled the applicant, we informed the regulatory authority that we could no longer recommend that it deny the permit.

As an initial regulatory step to remove the uncertainty created by the decision and to ensure there would be no lapse in permitting provisions under approved State programs, we published an interim final rule (IFR) on an emergency basis on April 21, 1997. See 62 FR 19451 (1997). We published the IFR to implement the Court of Appeals' decision in *NMA* v. *DOI I* and to close the regulatory gap created by that decision. In the IFR, we removed the portions of the 1988 and 1989 rules which were inconsistent with the appeals court's interpretation of SMCRA in *NMA* v. *DOI I*. Most significantly, the IFR did not authorize OSM to deny permits based on outstanding violations of an applicant's owners and controllers. Because the emergency publication of the IFR did not include public notice and opportunity for comment, we stated in the preamble to the IFR that we intended to replace the IFR through rulemaking conducted in accordance with standard notice and comment procedures under the Administrative Procedure Act. In honoring this commitment, we published proposed rules on December 21, 1998. See 63 FR 70580 (1998).

In June 1997, NMA filed suit in the U.S. District Court for the District of Columbia, challenging the IFR on broad grounds. On June 15, 1998, the district court issued a decision upholding the IFR in its entirety. *National Mining Association* v. *Babbitt*, No. 97–1418 (AER) (D.D.C. June 15, 1998).

On May 28, 1999, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in NMA's appeal of the district court's ruling. *National Mining Association.* v. *U.S. Department of the Interior*, 177 F.3d 1 (D.C. Cir. 1999) (*NMA* v. *DOI II*). The court agreed with OSM that section 510(c) of SMCRA, 30 U.S.C. 1260(c), allows an applicant to be held accountable for violations cited at operations that the applicant owns or controls, including ''limitless downstream violations'' at operations indirectly owned or controlled by an applicant through intermediary entities. *Id.* at 4–5. The court agreed with NMA, however, that ''[f]or violations of an operation that the applicant 'has controlled' but no longer does, * * * the Congress authorized permit-blocking only if there is 'a demonstrated pattern of willful violations' '' under section 510(c) of SMCRA. *Id.* at 5.

Next, the court addressed NMA's challenge to certain of the IFR's presumptions of ownership or control. At 30 CFR 773.5(b)(1) through (6), the IFR contains six separate presumptions of ownership or control. If subject to one of the presumptions, the applicant (or other person subject to the presumption) could attempt to rebut the presumption by demonstrating that he or she ''does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted.'' 30 CFR 773.5(b). NMA challenged four of these presumptions, which applied when a person: (1) was an officer or director of an entity (§ 773.5(b)(1)); (2) had the ability to commit the financial or real property assets or working resources of an entity (§ 773.5(b)(3)); (3) was a general partner in a partnership (§ 773.5(b)(4)); or (4) owned 10 through 50 percent of an entity (§ 773.5(b)(5)). NMA did not challenge the presumptions pertaining to being the operator of a surface coal mining operation (§ 773.5(b)(2)) or owning or controlling coal to be mined by another person and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation (§ 773.5(b)(6)). Therefore, the court did not rule on their validity. *NMA* v. *DOI II*, 177 F.3d at 6 n.6.

In addressing NMA's challenge to the presumptions, the court described a general standard for evaluating the validity of rebuttable presumptions and then applied that standard to the four rebuttable presumptions challenged by NMA. The court found two of the challenged ownership or control presumptions—having the ability to control the assets of an entity and being a general partner in a partnership—to be ''well-grounded.'' *Id.* at 7. However, the court agreed with NMA that OSM cannot presume that officers and directors or 10 through 50 percent shareholders are controllers of mining operations. *Id.* at 6.

On the applicability of the 5-year statute of limitations at 28 U.S.C. 2462, the court agreed with OSM that the section 2462 limitations period does not apply to violations when determining permit eligibility under section 510(c) of SMCRA, 30 U.S.C. 1260(c). *Id.* at 7–8. However, the court agreed with NMA that the rule was impermissibly retroactive in its effect to the extent it authorized permit denials based on indirect control in cases where *both* the assumption of indirect control and the violation occurred before November 2, 1988, the effective date of OSM's 1988 ownership and control rule. *Id.* at 8.

NMA also challenged the IFR's permit application information provisions, which required like our previous rules, an applicant to submit information in addition to the information expressly required by sections 507 and 510(c) of SMCRA, 30 U.S.C. 1257 and 1260(c). The court agreed with OSM that SMCRA's information requirements ''are not exhaustive'' and that OSM can require the submission of additional information ''needed to ensure compliance with the Act.'' *Id.* at 9.

Finally, on NMA's challenge to the IFR's suspension and rescission provisions relative to improvidently issued permits, the court agreed with OSM that section 201(c) of SMCRA, 30 U.S.C. 1211(c), expressly authorizes OSM to suspend or rescind improvidently issued permits. In addition to that express authority, the court also found that OSM retained ''implied'' authority to suspend or rescind improvidently issued permits ''because of its express authority to deny permits in the first instance.'' *Id.* at 9. However, the court decided that OSM

may only order cessation of State-permitted operations in accordance with the procedures established under section 521 of SMCRA, 30 U.S.C. 1271. Specifically, OSM may order immediate cessation of a State-permitted operation if the operation poses an ''imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm * * *'' SMCRA section 521(a)(2), 30 U.S.C. 1271(a)(2). Absent these circumstances, OSM may order cessation of a State-permitted operation only in accordance with section 521(a)(3), which includes the requirements to: (1) Provide a notice of violation to the permittee or his agent; (2) establish an abatement period; (3) provide opportunity for a public hearing; and (4) make a written finding that abatement of the violation has not occurred within the abatement period. *Id*. at 9–10; SMCRA at section 521(a)(3), 30 U.S.C. 1271(a)(3).

II. How Did We Obtain and Consider Public Input To Assist in Developing This Final Rule?

In June of 1997, a team of Department of the Interior employees met with State regulatory authorities to discuss rulemaking options. We also sought input from citizens and the regulated industry. Subsequently, we decided to reevaluate all aspects of our regulations pertaining to ownership and control and related issues.

On October 29, 1997, we published an Advance Notice of Proposed Rulemaking in the **Federal Register**. In the notice, we committed to hold public meetings and solicit comments from all interested parties on a wide range of topics related to ownership and control, with the ultimate goal of proposing new rules. See 62 FR 56139 (1997).

We conducted outreach from October 29, 1997, through January 16, 1998. We invited approximately 900 people and organizations to participate in the outreach effort. We provided them with an issue paper to use as the basis to elicit ideas, comments, and suggestions on potential regulatory topics and issues. Seventy people attended seven public meetings held in different locations throughout the United States. We also received written comments from some parties. During the outreach period, we offered to meet separately with any person or group wanting such a meeting. As a result of our offer, members of the team also met with an industry association and held individual discussions with several environmental advocates.

At the conclusion of the outreach, the team began to develop rulemaking options on many regulatory provisions related to ownership and control. The team continued its discussions with State regulatory authorities to keep them informed of our progress. A meeting with the States was held January 28 through 30, 1998, to discuss the results of the outreach.

We published a proposed rule for public review and comment on December 21, 1998 (63 FR 70580). We originally scheduled the comment period to close on February 19, 1999. In response to requests, we reopened the comment period from February 23, 1999 to March 25, 1999 (64 FR 8763); from March 31, 1999 to April 15, 1999 (64 FR 15322); and from May 4, 1999 to May 10, 1999 (64 FR 23811). On June 7, 2000, we reopened and extended the comment period to July 7, 2000 (65 FR 36097) in order to obtain input from the public on the effects of *NMA* v. *DOI II.*

During the comment period, we received separate requests from two State associations, an industry association, and representatives of several environmental organizations to meet with the team to ask questions about the proposal. We met with representatives of the two State associations, the industry association, and the representatives from environmental organizations (via a telephone conference call). A summary of each meeting is recorded in the Administrative Record for this rulemaking.

We received 103 comment documents specific to the proposed rule: 18 from private citizens, 36 from companies and associations affiliated with the coal mining industry, 31 from environmental advocates and organizations, and 18 from Federal, State, and local government entities and associations. Since no one requested a public hearing, we did not hold a hearing. In developing the final rule, we considered all comments that were germane to the proposed rule. In this preamble, we discuss how we modified certain concepts and provisions in response to comments and the *NMA* v. *DOI II* decision. We also explain the disposition of those comments that did not result in a change from the proposed rule.

III. How Does the Final Rule Differ Stylistically From the Proposed Rule?

On June 1, 1998, the President issued an Executive Memorandum requiring the use of plain language in all proposed and final rulemaking documents published after January 1, 1999. The memorandum provides the following description of plain language.

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:

- Common, everyday words, except for necessary technical terms;
- You and other pronouns;
- The active voice; and
- Short sentences.

On June 10, 1998, the Office of the Secretary of the Interior issued a memorandum requiring the immediate use of plain language in proposed and final rulemaking documents. We met this requirement by incorporating plain language principles to an even greater extent in this final rule than in the proposed rule.

The plain language principles, to the extent they were used in the proposed rule, generated a substantial number of comments. We address two of the comments here regarding the use of pronouns. One commenter asked, regarding proposed § 846.1, if ''we'' means only OSM, and whether this means the States do not have to use alternative enforcement or only have to use it on Federal lands. Another commenter asked, regarding proposed § 774.13(e), does ''us'' mean OSM if a State has not yet adopted a counterpart? In this preamble, ''we'', ''our'', and ''us'' refer to OSM, unless otherwise stated. In our rule language the pronouns ''we'', ''our'' and ''us'' refer to both the Federal and State regulatory authorities, or whichever one applies in the specific situation, generally OSM for Federal programs or the State regulatory authority for an approved State program, unless otherwise indicated.

We also note that we use several terms with respect to the temporal aspect of this rulemaking. In this rulemaking, we refer to ''previous,'' ''existing,'' ''proposed,'' and ''final'' rules and regulations. ''Previous'' regulations are those that, once this rulemaking is effective, will no longer exist. ''Existing'' regulations are those that are unaffected by this rulemaking. ''Proposed'' regulations are those provisions we published in our December 21, 1998, proposed rule. ''Final'' rule and ''final'' regulations refer to this rulemaking, including existing regulations that are redesignated in this rulemaking.

The rest of the comments we received on plain language issues are discussed in section V.E. of this preamble.

IV. Derivation Tables

Following are the Derivation Tables for this final rule. The Derivation Tables provide a useful tool for ascertaining in

which sections our final provisions were proposed (if applicable) and where our previous, analogous provisions existed (if applicable). When two asterisks (**) appear in the ''proposed rule'' column, it means we retained an existing section or provision, verbatim (or nearly verbatim if only plain language principles were applied), but redesignated the section or provision in this final rule for organizational purposes. Three asterisks (***) in the ''proposed rule'' column means the final provision was not proposed, but that we added the provision: (1) In response to comments, or (2) in response to the decision in *NMA* v. *DOI II,* or (3) because a provision proposed to be removed is continued in this final rulemaking, or (4) because the provision is needed for *internally consistency* with other adopted provisions.

PART 701

Final rule	Proposed rule	Previous regulations
§ 701.5	§ [as indicated below]	§ [as indicated below].
Applicant/Violator System or AVS	§ 701.5 Applicant/Violator System or AVS	§ 773.5 Applicant/Violator System or AVS.
Control or controller	§ 778.5(a)(1) through (a)(8) and 778.5(b)(2) Control.	§ 773.5 Owned or controlled and Owns or controls.
Knowing or knowingly	§ 701.5 Knowing or knowingly	§ 724.5 and 846.5 Knowingly.
Own, owner, or ownership	§ 778.5(b)(1) Ownership	§ 773.5 Owned or controlled and Owns or controls.
Successor in interest*	§ 701.5 Successor in interest	§ 701.5 Successor in interest.
Violation	§ 701.5 Violation notice	§ 773.5 Violation notice.
Violation, failure or refusal	§ 846.5 Violation, failure, or refusal	§ 724.5 and 846.5 Violation, failure or refusal.
Violation notice	§ 701.5 Violation notice	§ 773.5 Violation notice.
Willful or willfully	§ 701.5 Willful or willfully	§ 724.5 and 846.5 Willfully.
Willful violation is removed	Willful violation proposed to be removed	§ 701.5 Willful violation.

* Successor in interest is unchanged from the previous definition.

FINAL PART 724

Final rule	Proposed rule	Previous regulations
§ 724.5 is removed	§ [as indicated below]	§ 724.5 Definitions.
	§ 701.5 Knowing or knowingly	Knowingly.
	§ 846.5 Violation, failure, or refusal.	Violation, failure, or refusal
	§ 701.5 Willful or willfully	Willfully.

FINAL PART 773

Final rule	Proposed rule	Previous regulation
§ 773.3	§ 773.10	§ 773.10.
(a)	(a)	(a).
(b)	(b)	(b).
§ 773.4	(**)	§ 773.11.
§ 773.5	(**)	§ 773.12.
§ 773.6	(**)	§ 773.13.
§ 773.7	(**)	§ 773.15.
(a)	(**)	§ 773.15(a)(1).
(b)	(**)	§ 773.15(a)(2).
§ 773.8	(***)	
(a)	§§ 773.15(b)(1), (b)(2) and (b)(3)	
(b)	§ 773.15(b)(1)	§ 773.22(d).
(b)(1)	§ 773.15(b)(1)	§ 773.22(d).
(b)(2)	§ 773.22(c)	§ 773.23(a)(2).
(c)	§ 773.22(c)	§ 773.22(d).
§ 773.9	§ 773.15(b)	§ 773.22.
(a)	§ 773.15(b)(1)	§ 773.22(a).
(b)	§ 773.15(a)(3)	
§ 773.10	§ 773.15(b)(2)	§ 773.22(a).
(a)	§ 773.15(b)(2)(i)	§ 773.22(a).
(b)	§§ 773.15(a)(3) and (b)(2)(ii)	§ 773.22(b).
(c)	§ 773.15(b)(2)(iii)	§ 773.22(b).
§ 773.11	§ 773.15(b)(3)	§ 773.23.
(a)	§ 773.15(b)(3)	§ 773.23(a).
(a)(1)	§ 773.(b)(3)(i)(A)	§ 773.23(a)(1).
(a)(2)	§ 773.15(b)(3)(i)(A)	§ 773.23(a).
(a)(3)	§ 773.15(b)(3)(i)(A)	§§ 773.23(a)(1) and (b).
(a)(4)	§ 773.15(b)(3)(i)(A)	§§ 773.159(b)(1) and 773.23(a).
(b)	§§ 773.15(a)(3) and (b)(3)(i)(A)	§ 773.23(a).
§ 773.12	§ 773.16	§ 773.15(b).
(a)	§ 773.16(a)	§ 773.15(b)(1).
(a)(1)	§ 773.15(b)(3)(i)(B)	§ 773.15(b)(1).

FINAL PART 773—Continued

Final rule	Proposed rule	Previous regulation
(a)(2)	(***)	
(a)(3)	(***)	
(b)	(***)	
(c)	§ 773.15(b)(i)(D)	§ 773.15(b)(3).
(d)	§ 773.15(e)	§ 773.15(e).
(e)	§ 773.16(a)(2)	
§ 773.13	(**)	§ 773.15(b)(4).
(a)	(**)	§§ 773.15(b)(4) and (b)(4)(i)(B).
(a)(1)	(**)	§ 773.15(b)(4)(i)(A).
(a)(2)	(**)	§ 773.15(b)(4)(i)(C).
(a)(2)(i)	instruction #8.d	§ 773.15(b)(4)(i)(C)(*1*).
(a)(2)(ii)	(**)	§ 773.15(b)(4)(i)(C)(*2*).
(b)	(**)	§ 773.15(b)(4)(ii).
(b)(1)	(**)	§ 773.15(b)(4)(ii)(A).
(b)(2)	(**)	§ 773.15(b)(4)(ii)(B).
(b)(3)	(**)	§ 773.15(b)(4)(ii)(C).
§ 773.14	§ 773.16(b)	§§ 773.15(b)(1) and (b)(2).
(a)	§ 773.16(b)	§§ 773.15(b)(1) and (b)(2).
(a)(1)	§§ 773.16(b) and (b)(1)(ii)	§§ 773.15(b)(1) and (b)(2).
(a)(2)	§ 773.15(b)(3)(i)(C)	
(b)	§§ 773.16(b)	§ 773.15(b)(2).
(b)(1)	(***)	§ 773.15(b)(2).
(b)(2)	§§ 773.16(b)(3) and 773.15(b)(3)(i)(B)(*1*)	
(b)(3)	(***)	
(b)(3)(i)	(***)	
(b)(3)(ii)	(***)	
(b)(4)	§ 773.15(b)(3)(i)(B)(*2*)	§ 773.15(b)(1)(ii).
(c)	§ 773.20(b)	§ 773.20(a) and (b).
(c)(1)	§ 773.16(b)(2)(iii)	§ 773.20(b)(1)(ii)(A).
(c)(2)	§§ 773.20(b)(2)(ii) and (b)(3)	§ 773.20(b)(1)(ii)(B).
(c)(3)	§ 773.15(b)(3)(i)(B)(*2*)	§ 773.15(b)(1)(ii).
(c)(4)	(***)	
§ 773.15	(**)	§ 773.15(c).
(a)	(**)	§ 773.15(c)(1).
(n)	§ 773.15(a)(3)	
§ 773.21	§ 773.20	§ 773.20.
(a)	§§ 773.20(a) and (b)(1)	§§ 773.20(a) and (b)(1)(i).
(b)	§ 773.20(b)	§ 773.20(b).
(b)(1)	§ 773.20(b)(3)	§ 773.20(b)(2)(ii).
(b)(2)	§ 773.20(b)(2)(i)	§ 773.20(b)(1)(ii)(A).
(b)(3)	§ 773.20(b)(2)(i)	§ 773.20(b)(1)(ii)(A).
(c)	§ 773.21	§ 773.21.
(c)(1)	§ 773.21	§ 773.21.
(c)(2)	(***)	
(d)	§§ 773.21(a)(1) thru (a)(5)	§§ 773.21(a) and (a)(1) thru (a)(4).
(e)	(***)	§§ 773.20(b)(2) and (b)(2)(i).
§ 773.22	§§ 773.20 and 773.21	§§ 773.20 and 773.21.
(a)	§ 773.21	§ 773.20(c)(2).
(a)(1)	§ 773.21(a)	§ 773.20(a).
(a)(2)	(***)	
(b)	§ 773.21(a)	§ 773.21(a).
(c)	§ 773.21(a)	§ 773.21(a).
(d)	(***)	
(e)	§ 773.20(c)(2)	§ 773.20(c)(2).
(f)	§ 773.20(c)(2)	§ 773.21.
(g)	(***)	
(h)	§ 773.20(c)(2)	§ 773.20(c)(2).
§ 773.23	§ 773.21(a)	§ 773.21(a)(2).
(a)	§ 773.21(a)(2)	§ 773.21(a)(4).
(a)(1)	§ 773.21(a)(4)	§ 773.21(a)(1).
(a)(2)	§ 773.21(a)(1)	§ 773.21(a)(3).
(a)(3)	§ 773.21(a)(3)	§ 773.21(a)(3).
(a)(4)	§ 773.21(a)(3)	§ 773.21(b).
(a)(5)	§ 773.21(b)	§ 773.21(b).
(a)(6)	§ 773.21(a)(5)	
(b)	(***)	
(c)	§ 773.21(b)	§ 773.21(b).
(c)(1)	§ 773.21(b)	§ 773.21(b).
(c)(2)	(***)	
(d)	§ 773.20(c)(2)	§ 773.20(c)(2).
§ 773.24 is removed	§ 773.24	§ 773.24.
§ 773.25	§ 773.24(a)	§ 773.24(a)(1).

FINAL PART 773—Continued

Final rule	Proposed rule	Previous regulation
(a)	§ 773.24(a)	§ 773.24(a)(1).
(b)	§ 773.24(a)	
(c)	§ 773.24(a)	§ 773.24(a)(1).
§ 773.26	§ 773.24(b)	§ 773.24(b).
(a)	§ 773.24(b)	§ 773.24(b).
(a)(1)	§ 773.25(b)(2)	§ 773.24(b).
(a)(2)	§ 773.25(b)(3)	§ 773.24(b).
(b)	§ 773.24(d)	
(c)	§§ 773.25(b)(1) and (b)(2)	§§ 773.25(b)(1) and (ii).
(d)	(***)	
§ 773.27	§ 773.25(c)	§ 773.25(c)(1).
(a)	§ 773.25(c)(2)	§ 773.25(c)(1)
(a)(1)	§ 773.25(c)(2)	§ 773.25(c)(1)(i)
(a)(2)	§ 773.25(c)(2)	§ 773.25(c)(1)(i).
(b)	§ 773.25(c)(3)	§ 773.25(c)(2).
(c)	§ 773.25(c)(3)(i)	§ 773.25(c)(2).
(c)(1)	§ 773.25(c)(i)(A)	§ 773.25(c)(2)(i)(A).
(c)(2)	§ 773.25(c)(i)(B)	§ 773.25(c)(2)(i)(B).
(c)(3)	§ 773.25(c)(3)(i)(C)	§ 773.25(c)(2)(i)(C).
(c)(4)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
(c)(4)(i)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
(c)(4)(ii)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
(c)(4)(iii)	§ 773.25(c)(3)(i)(D)	§ 773.25(c)(2)(i)(D).
§ 773.28	§ 773.24(c)	§ 773.24(c).
(a)	§ 773.24(c)(1)	§ 773.24(c).
(b)	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(b)(1)	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(b)(12	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(c)	§ 773.24(c)(2)	§ 773.24(d)(2)(i).
(d)	(***)	
(e)	§ 773.24(c)(3)	§ 773.24(d)(2)(ii).
(f)	§ 773.25(d)	§ 773.24(d).

** Section/provision redesignation only. This section was not redesignated in the proposed rule.
*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of section IV.B. of this preamble.

FINAL PART 774

Final rule	Proposed rule	Previous regulation
§ 774.1	* * *	§ 774.1.
§ 774.9	§ 774.10	§ 774.10.
(a)	(a)	(a).
(b)	(b)	(b).
§ 774.10	(**)	§ 774.11.
§ 774.11	§ 773.22	
(a)	§ 773.22(d)	§ 773.15(b)(1).
(a)(1)	§ 773.15(b)(2)(i)	§ 773.15(b)(1).
(a)(2)	§ 773.22(c)	§ 773.15(b)(1).
(a)(3)	§§ 774.13(e) and 774.17(a)(2)	§§ 773.15(b)(1) and 773.22(d).
(a)(4)	§ 773.22(c)	§ 773.15(b)(1).
(b)	§§ 773.22(a) and 773.25(d)	§ 773.22(d).
(c)	§ 773.15(b)(3)(i)(D)	§ 773.15(b)(3).
(c)(1)	§ 773.15(b)(3)(i)(D)(*1*)	§ 773.15(b)(3).
(c)(2)	§ 773.15(b)(3)(i)(D)(*2*)	§ 773.15(b)(3).
(d)	§ 773.15(b)(3)(i)(E)	§ 773.15(b)(3).
(e)	§§ 773.17(k) and 773.25(d)	§ 773.25(d).
(f)	§§ 773.15(b)(1)(i), (b)(1)(i)(A), (b)(1)(i)(B), and 773.17(k).	
(f)(1)	§ 773.17(k)	
(f)(2)	§§ 773.25(d)	§ 773.25(d).
(f)(3)	§ 778.13(c)(3)	§ 778.13(c).
(f)(3)(i)	§ 778.13(c)(3)	§ 778.13(c).
(f)(3)(ii)	§§ 773.17(k) and 778.13(m)	
(g)	§§ 773.17(k) and 773.24	
§ 774.12	§§ 773.17(h), and 774.13(e)	§ 773.17(h).
(a)	§ 773.17(h)	§ 773.17(h).
(b)	* * *	
(c)	§§ 774.13(e) and 774.17(a)(2)	§ 774.17(a).
(c)(1)	§§ 774.13(e) and 774.17(a)(2)	§ 774.17(a).

FINAL PART 774—Continued

Final rule	Proposed rule	Previous regulation
(c)(2)	§§ 774.13(e), 774.17(a)(2), and 778.13(c)(1)(iii)	§ 778.13(c)(3).

**Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.
***This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 778

Final rule	Proposed rule	Previous regulation
§ 778.8	§ 778.10	§ 778.10.
(a)	§ 778.10(a)	§ 778.19(a).
(b)	§ 778.10(b)	§ 778.10(b).
§ 778.9	§ 778.13(o)	
(a)	§ 778.13(o)	
(a)(1)	§ 778.13(o)	
(a)(2)	§ 778.13(o)	
(a)(3)	§ 778.13(o)	
(b)	(***)	
(c)	§ 778.13(p)	
(d)	§§ 778.13(1) and 778.14(d)	§§ 778.13(k) and 778.14(d).
§ 778.11	§ 778.13	778.13.
(a)	§ 778.13	§ 778.13.
(a)(1)	§ 778.13(a)	§ 778.13(a).
(a)(2)	§§ 778.13(b)(1) and (b)(3)	§ 778.13(b).
(b)	§ 778.13(b)	§ 778.13(b).
(b)(1)	§ 778.13(b)(1)	§ 778.13(b)(1)
(b)(2)	§ 778.13(b)(2)	§ 778.13(b)(2).
(b)(3)	§ 778.13(b)(3)	
(b)(4)	§ 778.13(b)(4)	§ 778.13(b)(3).
(c)	§ 778.13(c)(3)	§ 778.13(c).
(c)(1)	§ 778.13(c)(3)(i)	§ 778.13(c).
(c)(2)	§ 778.13(c)(3)(ii)	§ 778.13(c).
(c)(3)	§ 778.13(c)(3)(iii)	§ 778.13(c).
(c)(4)	§ 778.13(c)(3)(v)	§ 778.13(c)
(c)(5)	§ 778.13(c)(3)(iv)	§ 778.13(c).
(d)	§ 778.13(m)	
(e)	§ 778.13(c)(1)	§ 778.13(c).
(e)(1)	§ 778.13(c)(1)(i)	§ 778.13(c)(1).
(e)(2)	§§ 778.13(c)(1)(ii) and (iii)	§§ 778.13(c)(2) and (c)(3).
(e)(3)	§ 778.13(c)(1)(iii)	§ 778.13(c)(3).
§ 778.12	§§ 778.13(e), (f), and (g)	§ § 778.13(d), (e), and (f).
(a)	§ 778.13(e)	§ 778.13(d).
(b)	§ 778.13(f)	§ 778.13(e).
(c)	§ 778.13(g)	§ 778.13(d) and (f).
(c)(1)	§ 778.13(g)	§ 778.13(f)(1).
(c)(2)	§ 778.13(g)	§ 778.13(f)(1).
(c)(3)	§ 778.13(g)	§ 778.13(f)(1).
(c)(4)	§ 778.13(g)	§ 778.13(f)(1).
(c)(5)	778.13(g)	§ 778.13(f)(2).
§ 778.13	§ 778.13(h), (i), (j), and (k)	§§ 778.13(g), (h), (i), and (j).
(a)	§ 778.13(h)	§ 778.13(g).
(a)(1)	§ 778.13(h)	§ 778.13(g).
(a)(2)	§ 778.13(h)	§ 778.13(g).
(a)(3)	§ 778.13(h)	§ 778.13(g).
(b)	§ 778.13(i)	§ 778.13(h).
(c)	§ 778.13(k)	§ 778.13(j)
(d)	§ 778.13(j)	§ 778.13(i).
§ 778.14	§ 778.14	§ 778.14.
(a)	§§ 778.14 and 778.14(a)	§§ 778.14 and 778.14(a).
(a)(1)	§ 778.14(a)(1)	§ 778.14(a)(1)
(a)(2)	§ 778.14(a)(2)	§ 778.14(a)(2).
(b)	§ 778.14(b)	§ 778.14(b).
(b)(1)	§ 778.14(b)(1)	§ 778.14(b)(1).
(b)(2)	§§ 778.14(b)(1) and (b)(4)	§§ 778.14(b)(1) and (b)(4).
(b)(3)	§ 778.14(b)(2)	§ 778.14(b)(2).
(b)(4)	§ 778.14(b)(3)	§ 778.14(b)(3).
(b)(5)	§§ 778.14(b)(4) and (b)(5)	§§ 778.14(b)(4) and (b)(5).
(c)	§ 778.14(c)	§ 778.14(c).
(c)(1)	§ 778.14(c)(1)	§ 778.14(c)(1).
(c)(2)	§ 778.14(c)(1)	§ 778.14(c)(1).
(c)(3)	§ 778.14(c)(1)	§ 778.14(c)(1).

FINAL PART 778—Continued

Final rule	Proposed rule	Previous regulation
(c)(4)	§ 778.14(c)(1)	§ 778.14(c)(1).
(c)(5)	§ 778.14(c)(2)	§ 778.14(c)(2).
(c)(6)	§ 778.14(c)(3)	§ 778.14(c)(3).
(c)(7)	***	§ 778.14(c).
(c)(8)	§ 778.14(c)(5)	§ 778.14(c)(5).

** Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.
*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 842

Final rule	Proposed rule	Previous regulation
§ 842.11:		
(e)(3)(i)	proposed to be removed	§ 842.11(e)(3)(i).

FINAL PART 843

Final rule	Proposed rule	Previous regulation
§ 843.5	proposed to be removed	§ 843.5.
§ 843.11		
(g)	§ 843.11(g)	§ 843.11(g).
§ 843.13	proposed as § 846.14	§ 843.13.
§ 843.21	§ 843.21	§ 843.21.
(a)	§ 843.21(a)	§ 843.21(a).
(a)(1)	§ 843.21(a)	§ 843.21(a).
(a)(2)	(***).	
(b)	§ 843.21(b)	§ 843.21(b).
(b)(1)	§ 843.21(b)(1)	§ 843.21(b)(1).
(b)(2)	§ 843.21(b)(2)	§ 843.21(b)(2).
(b)(3)	§§ 843.21(d)(1)(ii) and (d)(4)	§ 843.21(d).
(c)	§ 843.21(c)	§ 843.21(c).
(c)(1)	§ 843.21(c)	§ 843.21(c)(1).
(c)(2)	(***).	
(c)(3)	(***).	
(d)	§§ 843.21(d) and (d)(1)(i)	§ 843.21(b).
(e)	§ 843.21(d)(1)	§ 843.21(d).
(e)(1)	§ 843.21(d)(2)	§ 843.21(d).
(e)(2)	§ 843.21(d)(2)(i)	§ 843.21(d).
(f)	§ 843.21(e)	§ 843.21(e).
(f)(1)	§ 843.21(e)(1)	§ 843.21(e)(1).
(f)(2)	§ 843.21(e)(2)	§ 843.21(e)(2).
(f)(2)(i)	§ 843.21(e)(2)(i)	§ 843.21(e)(2)(i).
(f)(2)(ii)	(***).	
(f)(2)(iii)	§ 843.21(e)(2)(ii)	§ 843.21(e)(2)(ii).
(f)(2)(iv)	§ 843.21(e)(2)(ii)	§ 843.21(e)(2)(ii).
(f)(2)(v)	(***).	
(g)	§ 843.21(f)	§ 843.21(f).

*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

FINAL PART 846

Final rule	Proposed rule	Previous regulation
§ 846.1 is unchanged	§ 846.1	§ 846.1.
§ 846.5 is removed	§ 846.5	§ 846.5.
§ 846.12 is unchanged	§ 846.12(a)	§ 846.12.
§ 846.14 is unchanged	§ 846.12(b)	§ 846.14.
§ 846.17 is unchanged	§ 846.12(c)	§ 846.17.
§ 846.18 is unchanged	§ 846.12(d)	§ 846.18.

FINAL PART 847

Final rule	Proposed rule	Previous regulation
Part 847	(***).	
§ 847.1	§ 846.1.	

FINAL PART 847—Continued

Final rule	Proposed rule	Previous regulation
§ 847.2	(***).	
(a)	§ 846.1.	
(b)	§ 773.22(d).	
(c)	(***).	
(d)	(***).	
§ 847.11	§§ 846.11 and 846.11(a).	
(a)	§ 846.11(a)(1).	
(b)	§ 846.11(a)(2).	
(b)(1)	§ 846.11(a)(2)(i).	
(b)(2)	§ 846.11(a)(2)(ii).	
(c)	§ 846.11(a)(3).	
§ 847.16	§ 846.16.	
(a)	§ 846.16(a).	
(a)(1)	§ 846.16(a)(1)(i).	
(a)(2)	§ 846.16(a)(1)(ii).	
(a)(3)	§ 846.16(a)(1)(iii).	
(a)(4)	§ 846.16(a)(1)(iv).	
(a)(5)	§ 846.16(a)(1)(v).	
(a)(6)	§ 846.16(a)(1)(vi).	
(b)	§ 846.16(a)(2).	
(c)	§ 846.16(b).	
(d)	§ 846.16(c).	

** Section/provision redesignation only. This section/provision was not redesignated in the proposed rule.

*** This section/provision was added at the final rule stage. A more detailed explanation of this notation appears at the beginning of IV.B. of this preamble.

V. What General Comments Did We Receive on the Proposed Rule and How Have We Addressed These Comments in This Final Rule?

A. Withdraw the Proposal

Several commenters suggested that we withdraw the proposed rule and rewrite it using the ''precise language'' of the Act. We appreciate the concerns of these commenters. However, section 501(b) of the Act requires that we adopt regulations that not only implement the Act, but also ''are written in plain, understandable language.'' Furthermore, the courts have held in previous litigation concerning SMCRA that we have a duty to either flesh out the requirements or explain why it is unnecessary to do so.

A commenter recommended withdrawing the proposed rule because ''the added burdens are not justified by the rate of non-compliance, which OSM's own figures show is low.'' The commenter said we should ''simplify, rather than complicate, the permitting process and the limited non-compliance problems that do exist.'' The low rate of noncompliance is partially the result of the ownership and control and AVS-related regulations that have been in force since 1988. Moreover, in this final rule we are simplifying the permitting process to clarify the scope of the review and who is eligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c).

A commenter said the proposed rule must be withdrawn because it does not adequately respond to or incorporate comments provided in response to the Advance Notice of Proposed Rulemaking. The commenter said two organizations sent comments to OSM urging that OSM retain the requirement that imputes primary responsibility for compliance on those entities which own or control permit applicants and have outstanding unresolved violations of SMCRA or other environmental laws. The commenter said the agency's response to these comments has been wholly unsatisfactory.

We disagree. The commenter asks that we devise a compliance and permit eligibility scheme that the court has ruled to be unlawful. Under *NMA* v. *DOI I,* we cannot ''block'' applicants under section 510(c) based upon the outstanding violations of an applicant's owners and controllers. However, we can and must determine responsibility for outstanding violations and use all enforcement provisions available under the Act to achieve compliance from persons responsible for outstanding violations. Nothing in *NMA* v. *DOI I* or *NMA* v. *DOI II* changes this statutory requirement.

The same commenter also said the proposed rule fails to require that States (and OSM in Federal program states) use common law mechanisms to disregard corporate forms where applicants seek to apply for permits on behalf of owners and controllers who would be barred in their own right. Common law mechanisms exist independently from the enforcement provisions under SMCRA and are always available for a regulatory authority's use when circumstances warrant.

The same commenter also said the proposed rule fails to address coal exploration operations. We included coal exploration among the subjects in our solicitation for ideas and suggestions to be considered in the development of the proposed rule. States opposed requiring review under section 510(c) of SMCRA, 30 U.S.C. 1260(c), for coal exploration permits. These comments persuaded us not to address coal exploration, in the context of section 510(c), in this rulemaking.

B. Compliance With the Administrative Procedure Act

One commenter claimed that we provided no explanations for the proposed rule and that we thus had violated the Administrative Procedure Act (APA) by denying interested parties the opportunity to provide meaningful comments. Other commenters, expressed similar APA concerns.

We disagree with the various criticisms of our proposed rule with respect to the APA. First, the proposed rule did not deny interested parties the opportunity to provide meaningful comment. We provided the proposed rule language and an extensive preamble, explaining the subjects and issues involved. We received 103 written comments on the proposed rule, totaling over 800 pages of comments. We extended the comment period four

times in response to requests for extensions, including a reopening to accept comments on the effects of the *NMA* v. *DOI II* decision. See section II of this preamble. Before the development of the proposed rule, we provided public notice of our intent to propose a rule. We conducted both informal outreach and an extensive formal public outreach to gather ideas, suggestions, and concepts to consider in the development of the proposed rule. We hosted and attended meetings with the major groups of parties interested in this rulemaking. Taken together, these activities provided more than sufficient opportunity for input into this rulemaking. Not only have we fully complied with the APA, we actively reached out to bring all affected parties into this rulemaking process.

Commenters said the proposed rule is a radical departure from past ownership and control rules. They also said the 60-day comment period was ''woefully inadequate'' to allow meaningful public participation, and that OSM's advance pronouncement that no extensions of the comment period would be considered was arbitrary and capricious. In fact, we extended the comment period on the proposed rule three times in response to requests for extensions and reopened the comment period to allow for comments on the effects of *NMA* v. *DOI II* on the proposed rule. The final comment period totaled 140 days.

C. Public Participation

Several commenters suggested that citizens should have rights in the permitting process and related matters. These commenters also said OSM should expressly allow citizens to petition the agency to take enforcement action where citizens have a reason to believe that a violation exists, whether or not the State regulatory authority has taken action. Another commenter also expressed concerns about the citizen complaint process, and said it is important that citizens continue to be part of the SMCRA process so that they can voice concerns about inadequate data collection and tracking of violators by OSM.

We support public participation in regulatory processes, as required by the Act. Citizens have the right to voice their concerns regarding any aspect of a regulatory program. This final rule strengthens public participation in processes related to permit eligibility determinations. We further address public participation as it applies to this rulemaking, in our responses to comments received on specific sections of the proposed rule. See, *e.g.,* sections VI.M. and Y. of this preamble.

Further, our existing regulations emphasize the role of the public under SMCRA. The provisions for public participation in permit processing were found at previous 30 CFR 773.13 and existing 30 CFR part 775, which includes the ability of persons who have an interest which is or may be adversely affected to raise ownership and control issues during the permitting process and to request a hearing on the reasons for a permitting decision. Previous 30 CFR 773.13 is redesignated 30 CFR 773.6 in this final rule. Additional provisions pertaining to public participation and access to public records are found at existing 30 CFR 842.11, 842.12, and 842.16 and final § 843.21.

We also made AVS available to the public to increase public access to the computer system. AVS software is provided free of charge and can be ordered from the AVS Office in Lexington, Kentucky, by calling, toll-free, 1–800–643–9748. The software can also be downloaded from the AVS Office's Internet home page (Internet address: *http://www.avs.osmre.gov*). Citizens may also use the traditional method of visiting Federal and State offices to view application, permit, violation, ownership and control challenge, and enforcement records.

A commenter said that the public often has important information concerning ownership and control and that the Congress was very clear in demanding a public role in administrative and judicial processes, including the permitting process. According to the commenter, the proposed rule reflects a limited, insular, two-way relationship between the regulatory authority (we) and the applicant (you) that excludes affected citizens (us) because there is no pronoun for the general public.

We have and will continue to ensure that public participation is considered in all facets of the regulatory program. We heard very clearly the concerns expressed during the public outreach regarding citizen participation in regulatory processes. To the extent possible, we address those concerns in this rulemaking. We are always willing to accept information from citizens which may bear upon our responsibilities, or the responsibilities of the regulated industry, under the Act. Both our existing regulations and the provisions we adopt today expressly require us to consider information provided by the public, when appropriate.

D. Oversight

A commenter said that the proposal has serious implications for the States in terms of OSM's oversight of permitting decisions and all facets of the regulatory program. The commenter said States are most concerned about oversight expectations in the quantity of application information and the level of detail that should be devoted to investigations. Two commenters asked what oversight States can expect since AVS will not make permitting recommendations. The same commenters asked if oversight will be consistent and whether States will be ''taken to task'' over their permitting decisions during oversight. In contrast, another commenter said the proposed rule will result in inadequate oversight because OSM plans to cease providing permitting recommendations. Other commenters said oversight should be consistent and that OSM should adopt uniform review criteria. Two commenters asked whether the oversight reviews required for this final rule would be left to the OSM regional offices. These commenters suggested that the determinations required under the proposed rule would require OSM to give discretion and flexibility to States.

Our oversight obligations under the Act and regulations will not diminish as a result of these rules. To facilitate oversight of AVS, OSM's Directive REG–8, ''Oversight of State Regulatory Programs,'' provides that OSM will monitor States' responses to complaints and requests for assistance and services and each year will review a sample of one or more specified State activities, including permit eligibility determinations. We prepare an oversight findings report for each review and the findings report is summarized in the annual report for each State.

Concerning the level of detail that should be devoted to investigation, in this final rule we leave that decision principally to the regulatory authorities. We are not adopting specific references to investigations in part 773 in these final rules. However, we expect that regulatory authorities will investigate when circumstances warrant.

We previously provided permit eligibility recommendations to, among other things, assist in expediting the States' permitting processes. We are aware that the purpose of the recommendations was sometimes misinterpreted as a mandate. We also know that many States benefitted from the recommendations and some expressed their appreciation. However, the States now possess sufficient technology as well as familiarity with

the uses of the information in the computer system that they no longer require permitting recommendations. See further discussion of this point in section VI.E. of this preamble.

E. Plain Language

''Shall'' Is the Language of the Act

We received numerous comments on the use of plain language principles in the proposed rule and our failure to use the word ''shall.'' Some commenters argued that the word ''shall'' is the language of the Act and that no other word is sufficient as the language of command. However, the guidance on plain language principles prohibits use of ''shall'' in rulemaking. The Department has provided two guidance documents on plain language, *Writing User-Friendly Regulations* and *Writing Readable Regulations,* by Thomas A. Murakowski. The regulations in this final rule are consistent with plain language principles. We use ''must'' instead of ''shall'' as the language of command. Where the Act or regulations provides for a mandatory action, we use ''must.'' Where previous regulations used ''shall'' to indicate a future action, we use ''will.'' When an action is not mandatory, we use ''may,'' except that the use of ''may not,'' is equivalent to a mandatory prohibition.

Changing ''shall'' to ''may'' Undermines Mandatory Enforcement of the Act

Many commenters said that changing ''shall'' to ''may'' undermines mandatory enforcement under the Act and that ''may'' is an unacceptable substitute. Some of the commenters said the change gives regulatory authorities the option not to enforce the regulations.

The absence of the word ''shall'' does not compromise obligations under our regulations or the obligations of the States and the industry to comply with the Act and regulatory requirements. To the contrary, we believe using the word ''shall'' creates confusion in the minds of readers. We are not alone in this belief. In his book, *Plain English for Lawyers,* Richard C. Wydick, Professor of Law at the University of California at Davis, has this to say about the word ''shall'':

> When you draft rules * * * be precise in using words of authority.* * * The biggest troublemaker is *shall.* Sometimes lawyers use it to impose a duty: ''The defendant *shall* file an answer within 30 days.* * *'' Other times lawyers use it to express future action (''the lease shall terminate * * *'') or even an entitlement (''the landlord shall have the right to inspect * * *''). Drafting experts have identified several additional shades of meaning *shall* can carry. To make matters worse, many lawyers do not realize how slippery shall is, so they use it freely, unaware of the booby traps they are laying for their readers * * *. In recent years * * * many U.S. drafting authorities have come around to the British Commonwealth view: don't use shall for any purpose—it is simply too unreliable.[1]

In the proposed rule, we used the words ''must,'' ''will,'' and ''may.'' We were cognizant of the effect of these words in each instance they were used. In this final rule, we consistently employed the following principles with respect to ''must,'' ''will,'' and ''may.''

We use the word * * *	to indicate that * * *
must	an action is mandatory.
will	an action will occur in the future.
may	an action could occur, but is not mandatory.
may not	not taking the specified action is mandatory.

Any change in meaning that the reader may perceive because we used the words in the table is due solely to the former use of the imprecise word ''shall'' to indicate that an action must, will, or may occur.

Plain Language Attempt is Unsuccessful

Several commenters said our attempt to use plain language principles in the proposed rule was unsuccessful and inconsistent with President Clinton's June 1, 1998, memorandum. The commenters also claimed that we failed to follow the recommendations of the **Federal Register** *Document Drafting Handbook* because we used more than three paragraph levels within a section. The commenters said we should create more sections instead of using more than three paragraph levels.

Our use of plain language principles in the proposed rule was consistent with the President's June 1, 1998, memorandum. However, we acknowledge that the proposed rule did not fully conform with plain language principles. This final rule, more fully uses plain language principles.

Most notably, in this final rule, we reorganized parts 773 and portions of parts 774 and 778 to accommodate fuller use of plain language principles. We divided lengthy sections into smaller, more numerous but more concise, sections; eliminated duplicate provisions; streamlined provisions, incorporated tables; and eliminated excessive paragraph levels within sections. The guidance provided to us regarding plain language is not optional. Rather, we are expected to adhere to the guidance, unless specific circumstances allow for variance within the rule language structure.

Use of Pronouns

Several commenters expressed concern over our use of pronouns in the proposed rule. Some of these commenters said that the use of ''we'' and ''you'' is confusing. These commenters also said that ''you'' should always mean the person to whom the regulation applies because industry will claim that ''you'' only means the applicant and that all other uses of ''you'' are irrelevant. Other commenters said the use of plain language implies that there are only two sides represented in the regulations—industry and regulators—and that there is no pronoun used to represent citizens.

The guidance documents on plain language that we previously cited in this section of the preamble provide explicit instructions on the use of personal pronouns. According to the guidance, the use of personal pronouns ''straightens out sentences and saves words.'' As with the preferred use of ''shall,'' we must use pronouns in our regulations unless we are avoiding a grammatical fracture or redundancy, or to make a distinction between or among the subjects that make up ''we'' or ''you.''

We acknowledge that our use of pronouns in the proposed rule sometimes may have been confusing. We eliminate that confusion in this final rule. Within the Department's restrictions, we always use ''we'' to mean OSM and the State regulatory authorities, unless otherwise stated. We always use ''you'' to mean whoever must comply with the regulation. Therefore, ''you'' almost always means an applicant or permittee, as applicable. For example, when we use the phrase, ''you, the applicant,'' it clarifies that ''you'' means ''the applicant'' whenever ''you'' appears in the provisions of that section.

We elected not to define ''we'' or ''you'' generically in these regulations because the antecedent for these pronouns varies in our regulations. Instead, we specified the meaning of ''we'' or ''you'' in each section of this final rule. As more of our regulations are converted to plain language, we will incorporate greater use of ''we'' and ''you.''

A commenter called the use of pronouns an informal, quasi-conversational style. This commenter

[1] Richard C. Wydick, *Plain English for Lawyers,* Durham, 1998, pp. 66–67.

also said our use of ''you'' and ''we'' does not conform to the guidance in the *Federal Register Document Drafting Handbook.*

Our use of ''we'' and ''you'' conforms to the guidance in the *Federal Register Document Drafting Handbook.* For example, the *Handbook* says we must use ''you'' to designate ''whoever must comply.'' (October 1998 Revision at MRR–1) This is how we used ''you'' in the proposed rule and how we use it in this final rule.

F. Other General Comments

A commenter expressed concern that the proposed rule will result in permit-specific eligibility determinations instead of entity or company-specific eligibility determinations and that this result is a step backward. Permit eligibility is inherently application or permit specific because violations are specific to a particular operation. The permit block sanction of section 510(c) applies only to the extent that a person remains responsible for that violation.

A commenter claimed that the proposed rules establish complex processes for determining eligibility and meeting information disclosure requirements. The commenter also claimed that ''owners'' and ''controllers'' are newly created categories that would be targeted for novel enforcement tools such as ''blocking permits where a permit applicant is an owner or controller of an operation with an outstanding violation,'' ''permanent ineligibility'' for a permit, ''special permit conditions,'' and ''joint and several liability for violations of permits to an extent not contemplated by the Act.''

The review process and eligibility determination are not complex and, in fact, have been simplified in this final rule. A regulatory authority will review applicant, operator, and ownership or control information; permit history information; and compliance information to arrive at an eligibility determination under section 510(c) of the Act, 30 U.S.C. 1260(c). A finding of permit eligibility is the end-product of a regulatory authority's review under section 510(c) of the Act, 30 U.S.C. 1260(c). This final rule also attempts to make information disclosure requirements clearer by organizing the requirements for providing applicant, operator, and ownership and control information; permit history; property interests; and violation information into separate, more easily understood sections. An applicant also may certify as to which parts of this information already in AVS are accurate and complete. See final § 778.9(a).

We disagree that ''owners'' and ''controllers'' are newly created categories. These designations are clearly anticipated under section 510(c) of SMCRA, 30 U.S.C. 1260(c), which uses the phrase ''owned or controlled.'' We also disagree that the final rule creates ''novel enforcement tools.'' We are not adopting the provisions concerning joint and several liability or special permit conditions. Under the final rule, the section 510(c) permit block sanction applies only to the extent authorized under *NMA* v. *DOI I* and *NMA* v. *DOI II.*

Commenters said they agreed with OSM that ''scofflaws'' should not be allowed to abandon one mining operation with uncorrected violations and uncompleted reclamation only to obtain permits for new operations ''through subterfuge or abusive manipulation of corporate entities.'' However, the commenters said, AVS relied upon massive information-gathering and mechanical name-linking and that this approach caused paperwork delays for legitimate operators. The commenters claimed the proposed rule would not reduce the burdens for legitimate operators ''to any significant level'' and that it ''does violence'' to a number of established legal principles and threatens new confusion, delays, and litigation.

We disagree that our regulations cause either massive information-gathering or delays in permitting for legitimate operators. Further, in *NMA* v. *DOI II,* the court ruled that we and the States may require information from permit applicants in excess of the information requirements specifically stated in the Act so long as the information is necessary to ensure compliance with the Act. *Id.*, 177 F.3d at 9. The information requirements in this final rule are, necessary to ensure compliance with the Act, including the permit block sanction of section 510(c).

A commenter expressed appreciation for OSM's efforts to propose regulations that are consistent with *NMA* v. *DOI I.* However, the commenter said the proposed rule appears more cumbersome and burdensome than the previous regulations, would require much additional effort to administer, and may detract from ensuring good reclamation in the field.

Our principal goal in this rulemaking is to adopt revised or new regulations that improve our implementation of SMCRA and with *NMA* v. *DOI I* and *NMA* v. *DOI II.* We have streamlined procedures and reduced burdens to the extent that we could do so while still retaining our ability to fully implement the permit block sanction of section 510(c). We relied upon the input of many sources, including our State partners, in developing the proposed and final rules. We disagree that the changes in our regulations, will detract from or inhibit good reclamation. On the contrary, we believe the provisions that allow a regulatory authority to better know an applicant will contribute to a more accurate forecast of whether an applicant, as a permittee, will be able to complete its reclamation and other statutory and program obligations.

Several commenters expressed concern that the changes in the proposed rule represent a weakening of the Federal rules and appeared to give unauthorized options to regulatory authorities relative to required enforcement actions. Some opposed the proposed rule changes because, they said, SMCRA requires OSM and the States to take enforcement action against every violation, that is, ''when you see a violation, you write a violation.'' These commenters asserted that SMCRA has a mandatory enforcement system that does not allow discretion when considering enforcement actions. We agree that violations, when known to a regulatory authority, must be cited. Nothing in this rulemaking alters that principle.

Several commenters asserted that the proposed rule weakens Federal protections, undercuts those State requirements that may exceed Federal requirements, and allows owners and controllers to engage in sham business arrangements to contravene section 510(c) of SMCRA. We believe this final rule strengthens the ability of regulatory authorities to take a variety of actions both inside and outside the permitting process to ensure compliance with SMCRA. The rule strengthens the information disclosure requirements for applicants and operators. It also clarifies the post-permit issuance obligations of regulatory authorities and permittees with respect to submitting new information, updating AVS, and other matters. It also emphasizes other enforcement provisions that may be used if applicants, permittees, operators, and other persons subject to the regulations fail to comply. Taken together, these revisions not only clarify and emphasize our ability to enforce section 510(c), 30 U.S.C. 1260(c), but other SMCRA provisions as well.

Another commenter said the proposed rule would not adequately address the regulatory gap left by the appeals court decision in *NMA* v. *DOI I.* The commenter claimed the industry has used the gap to continue to profit from past non-compliance of contract miners. The commenter said the proposed rule

would not require States to use all available procedures to bar owners and controllers from receiving new permits or to prosecute them. We disagree. The permit eligibility criteria and related procedures in the final rule are as restrictive as the rationale in the *NMA* v. *DOI I* and *II* decisions will allow.

A commenter said the proposal fails to address how to prevent new permit-related damage by entities who are owned or controlled by violators since section 510(c) of SMCRA can no longer be used. The commenter stated that, instead of lowering compliance requirements, regulatory authorities should adjust performance bonds to address the risk of default on reclamation obligations. This final rule does not reduce compliance requirements. Furthermore, section 509(a) of the Act and 30 CFR 800.14(b) already require that the amount of the bond be sufficient to assure completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture.

VI. In What Sections Did We Propose Revisions, What Specific Comments Did We Receive on Them, and How Have We Addressed These Comments in This Final Rule?

A. Section 701.5—Definitions

We proposed to make several changes to our regulatory definitions. We intended that the proposed changes would result in clearer and more useful regulatory definitions. One commenter said the definitions were satisfactory as proposed. Based upon our review of the comments and further deliberation, we modify most of the proposed definitions in this final rule. Each proposed definition is discussed below. Comments on a proposed definition and modifications adopted in this final rule are included in the discussion of each proposed definition.

Applicant/Violator System or AVS

We proposed to revise the definition for *Applicant/Violator System* or *AVS* and to move the definition to § 701.5. We received no comments on the proposed definition. The final rule modifies the proposed definition to clarify that AVS assists in implementing the Act. It is clearly not the only tool we use to implement the purposes of the Act. AVS is among several automated systems and other mechanisms that we rely upon to assist in implementing the Act. We modified the final definition to remove any potential confusion on this point.

''Control or controller'' and ''Own, Owner, or Ownership''

Section 510(c) of SMCRA, 30 U.S.C. 1260(c), provides that a surface coal mining permit will not be issued when a surface coal mining operation ''owned or controlled by the applicant'' is currently in violation of SMCRA or other laws pertaining to air or water quality. However, the Act does not define the phrase ''owned or controlled.'' We first defined the phrase in the 1988 ''ownership or control'' rule. 53 FR 38868 (October 3, 1988). In that rule, the concepts of ownership and control were defined together through a series of statuses or relationships under which OSM would either ''deem'' or ''presume'' ownership or control. *See, e.g.,* previous § 773.5. In the proposal underlying this final rule, we proposed to define ''ownership'' and ''control'' separately, eliminate presumptions of ownership or control, and provide examples to support the proposed definitions of ownership and control. *See* proposed §§ 778.5(a) and (b).

After the close of the comment period for the proposed rule, the D.C. Circuit issued its decision in *NMA* v. *DOI II*. 177 F.3d 1 (D.C. Cir. 1999). The court struck down two of the six presumptions of ownership or control in our previous ownership or control definitions at 30 CFR 773.5, and upheld two of the six. The court did not address the remaining two presumptions or the categories of ''deemed'' ownership or control, since these provisions were not challenged. The court's ruling on presumptions had no direct effect on our proposed definitions of ownership and control, since we had already proposed to eliminate all presumptions of ownership or control, including those invalidated by the court. Like the proposal, this final rule does not contain rebuttable presumptions.

The court also upheld our ability to deny permits based on *indirect* ownership or control. We retained a similar provision in this final rule. However, since the ability to deny permits based on indirect ownership or control, or ''downstream'' relationships, pertains more to how the definitions are applied than to the definitions themselves, we addressed the applicability of the court's holding in the discussion of permit eligibility determinations in section VI.E. of this preamble. At this point, however, we note that this final rule continues our prior ability to deny permits based on both direct ownership or control and indirect ownership or control through intermediary entities. We also retained the ability to ascertain ownership or control at all levels of a corporate chain through any combination of relationships establishing ownership or control under the definitions we adopt today. For example, if Company A owns Company B under our definition of ownership, Company A also owns all entities and operations which Company B owns or controls, and so on.

In this final rule, we retained the basic approach and substance of the proposed rule. However, based on comments, guidance from the court, and further deliberation, we made certain modifications which clarify the scope and applicability of the definitions and examples.

We moved the definitions and examples from proposed § 778.5 to final § 701.5. This will improve the organization by having all of our definitions in one section; this modification also emphasizes the general applicability of the definitions throughout 30 CFR parts 773, 774, and 778 and § 843.21 of our regulations (except as noted otherwise). We also modified the defined terms, from ''ownership'' and ''control'' to ''*own, owner,* or *ownership*'' and ''*control* or *controller*'', to clarify that the definitions encompass all forms of the words ''own'' and ''control,'' including both the verb and noun forms.

We retained the approach of defining ownership and control separately, to emphasize that section 510(c) uses the disjunctive phrase ''owned or controlled.'' This is significant in that section 510(c) requires permit denials when the applicant either owns *or* controls an operation with current violations. We moved the proposed examples of ownership or control to follow one of the categories of control—*see* final paragraph (5) of the definition—since the examples are more appropriately viewed as examples of control, rather than ownership. In this final rule, the examples are used to indicate when a person may, but does not necessarily, have ''the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.'' Since the focus of the inquiry is on who controls an entity or mining operation, in this preamble we use the phrase ''examples of control'' to refer to this regulatory provision. Thus, our final definition of control contains categories of ''deemed'' control (paragraphs (1) through (5)) and examples of control (paragraphs (5)(i) through (5)(vi)).

Our final definition of ''*own, owner,* or *ownership*'' is largely the same as our proposed definition of ''ownership,'' except that we moved the ''general

partner'' criterion from this definition to the definition of ''*control* or *controller*'' in final § 701.5 and eliminated the phrase ''or having the right to use, enjoy, or transmit to others the rights granted under a permit.'' We also added language to clarify that the final definition does not apply to ownership of real property, such as under final § 778.13 of this rule and 30 CFR § 778.15 of the existing rule. The final definition of ''*own, owner,* or *ownership*'' includes being a sole proprietor or possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity (*i.e.,* majority ownership). We added the term ''controlling'' based on the reality that sometimes persons who do not technically own stock (or other instruments of ownership) nonetheless have the ability to control the stock, either by holding the voting rights associated with the stock or other arrangement with the owner of record. Under this definition, if the predicate facts are present—*i.e.,* a person is a sole proprietor or majority shareholder—then the person is an owner. Our rationale for the greater than 50 percent threshold is explained below in our responses to comments. Also, while a sole proprietor is subsumed within the category of majority ownership, we decided to retain that criterion for the sake of clarity. We also reiterate that the definition we adopt today encompasses both direct ownership and indirect ownership through intermediary entities. Thus, if Company A owns 51 percent of Company B, and Company B owns 51 percent of Company C, Company A owns Company C. However, if Company A owns 49 percent of Company B, and Company B owns 51 percent of Company C, Company A *does not* own Company C, since Company A does not own Company B. In summary, if an entity owns another entity, it also owns all entities the other entity owns or controls.

We defined ''*control* or *controller*'' in terms of a series of specific relationships and statuses, which are individually enumerated, rather than the more general definition of control in the proposal. In our experience, since we first promulgated definitions of ownership and control in 1988, the relationships and statuses identified in the ''deemed'' portion of the definition (paragraphs (1) through (5)) will always constitute control, assuming the predicate facts are true. For example, if someone is a permittee, that fact alone, without further inquiry, demonstrates control under the definition. By contrast, in the examples of control listed in paragraphs (5)(i) through (5)(vi) of the definition, even if the predicate facts are true, that person may or may not be a controller, depending on the particular circumstances. Thus, a 20 percent shareholder of a corporation may be a controller, but only if that person also has ''the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.'' *See* final paragraph (5) of the definition. We provide the examples to identify statuses and relationships which, in our experience since 1988, often indicate actual control. Regulatory authorities and the regulated industry should consider the examples, and any other relevant factors or information, in meeting their responsibilities under this final rule. However, we stress that these examples do not give rise to a presumption of control and do not necessarily constitute control. Finally, as with our definition of ''*own, owner,* or *ownership*'', the definition of ''*control* or *controller*'' we adopt today encompasses both direct control and indirect control through intermediary entities. For example, if Company A controls Company B, Company A also controls all entities which Company B owns or controls.

Consistent with the view expressed in the preceding paragraph, we incorporated some of the proposed examples into the deemed categories of control because the person will always be a controller if the predicate facts are true. For example, we decided to move the examples encompassing permittees and operators from the proposed examples to the ''deemed'' portion of the final definition. We also moved the ''general partner in a partnership'' criterion from the proposed definition of ''ownership'' to the final definition of ''*control* or *controller.*'' Finally, based on comments, guidance from the court decisions, and further deliberation, we added two new examples of control. *See* final examples (5)(iii) and (5)(iv).

One other general point we emphasize is that our definition of ''*control* or *controller*'' includes the *ability* to control as well as the exercise of control. The reason is simple: The failure to exercise one's ability to control in order to prevent or to abate violations is as damaging to the environment or as dangerous to the public as actively causing violations. As such, paragraph (5) of the definition specifically provides that those who have the *ability* to determine the manner in which a surface coal mining operation is conducted, not just those who actually exercise control, are encompassed within our final definition of ''*control* or *controller.*'' When we use the term ''actual control'' in this preamble, we are referring to both the exercise of control and the ability to control.

Comments on the Proposed Definition of ''Ownership''

A commenter said the Congress intended that new permits should not be issued to an applicant who has an ownership relationship to a violation. The commenter said the proposed rule appears to make ownership irrelevant. The commenter suggested that all references to control should also include references to ownership. The thrust of the comment is that ''ownership alone, or control alone, are sufficient to impute responsibility.'' Another commenter said that proposed §§ 778.5(b)(1) and (b)(2) refer to ''owner'' and ''controller'' separately as though they have different meanings, while proposed § 778.5(a) defines ''owner or controller'' without distinguishing between the two.

We agree that an applicant's ownership of an operation with a current violation, standing alone, renders the applicant ineligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c). As explained above, because section 510(c) uses the disjunctive phrase ''owned *or* controlled'' (emphasis added), we retained our proposed approach of defining ownership and control separately to give independent meaning to the two terms. This is significant in that section 510(c) requires permit denials when the applicant either owns *or* controls an operation with current violations. In the proposal, we made it clear that either ownership or control of operations with violations could form the basis of a permit denial. *See, e.g.,* proposed §§ 773.15(b)(3)(i)(A) and (B); 773.16(a). When appropriate, this final rule references ownership and control concepts together to emphasize the statutory requirement of section 510(c). Also, we clarified that the examples pertain to control, and not to ownership.

This final rule emphasizes that the scope of permit denials under section 510(c) does not depend solely on the presence of control. Mere ownership, without control, can provide a basis for a permit denial. As such, a person who is an owner under the definition we adopt today cannot successfully challenge such ownership by demonstrating a lack of ability to control. The only way to successfully challenge ownership is to demonstrate that the predicate facts indicating

ownership are not true, *i.e.,* the person is not a sole proprietor or majority shareholder.

The same commenter said that the 10 percent threshold of ownership in section 507 of the Act, 30 U.S.C. 1257, should also be the threshold of ownership under our definition because, under certain circumstances, 10 percent ownership ''gives effective control to an entity.'' Another commenter agreed, making the same argument relative to section 507 of the Act, 30 U.S.C. 1257. The commenter claims, in substance: (1) The greater than 50 percent threshold is ''too restrictive for any meaningful application'' of SMCRA provisions; (2) few, if any, coal companies have a 50 percent owner; and (3) owners of substantial means in the company should be on notice of their ownership obligations to encourage compliance.

We disagree that the greater than 50 percent threshold is too restrictive and that the 10 percent threshold referenced in section 507 of the Act, 30 U.S.C. 1260(c), is appropriate. As noted, the Act does not define the term ''owned.'' Congress, in using that term, did not indicate if it meant partially owned or wholly owned. Thus, arguments can be made that as little as a few shares of stock all the way to 100 percent ownership, or anywhere in between, should constitute ownership. We adopted the greater than 50 percent threshold because greater than 50 percent ownership will usually confer control. However, we emphasize that a regulatory authority need not demonstrate actual control to deny a permit based on our definition of ownership.

We agree that even as little as 10 percent ownership may constitute effective control of an entity. Indeed, in striking down our previous presumption of ownership or control based on 10 through 50 percent ownership of an entity, the court of appeals, in *NMA* v. *DOI II,* noted that as little as 10 percent ownership ''may, under specific circumstances, confer control.* * *'' 177 F.3d at 6–7. As such, we adopted the 10 through 50 percent criterion as an example which *may* constitute control. *See* final paragraph (5)(iii). For ownership of 50 percent or less, it is appropriate to tie such ownership to control. Under paragraph (5) of the definition of ''*control* or *controller,*'' a regulatory authority attempting to sustain a finding of control based on 10 through 50 percent ownership must also demonstrate that that person has the ability to determine the manner in which mining is conducted. At paragraph (5)(iii), we also introduced the concept of ''relative percentage'' of ownership as an example of possible control. For example, a person may own only 20 percent of an entity, but may nonetheless be the greatest single owner of the entity. In that context, what may seem like a relatively small percentage of ownership may in fact confer actual control. Finally, while we note that less than 10 percent ownership is not likely to confer control, if a 10 percent shareholder does in fact control an entity, the applicant is required to identify the person in a permit application. Also, in identifying owners or controllers which are not disclosed by the applicant, a regulatory authority has leeway under paragraph (5) of the control definition to establish that even such minimal ownership constitutes control.

A commenter suggested that we change the portion of the proposed definition of ''ownership'' regarding percentage of ownership to ''more than 50 percent or controlling interest in the stock.'' In substance, this commenter believes that a controlling interest of less than 50 percent is sufficient to impute ownership.

We disagree. The final definition of ownership includes ''possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity.'' A person must own or control greater than 50 percent of the instruments of ownership in order to fall within our definition of ownership. If a person is the greatest single owner, but owns less than 50 percent, that is an indicator of actual control under paragraph (5)(iii) of our definition of *control* or *controller,* but it does not constitute ownership under this final rule.

Several commenters suggested that we delete the last part of the proposed definition: ''or having the right to use, enjoy, or transmit to others the rights granted under a permit.'' These commenters said that the phrase could ''result in improper interpretations'' by regulatory authorities. Alternatively, they agreed that it is unnecessary because it is clear that an owner possesses these rights. We agree with the latter comment. Therefore, we removed the phrase from the final definition of ''*own, owner,* or *ownership.*''

A commenter said that the proposed definition of ownership was ''without any consistent context,'' and that, ''[f]or the purposes of section 510(c), ownership means one thing—ownership of the mine operation.'' The commenter continued: ''The definition here does not even reference [a] mine operation.'' Another commenter said: ''[t]hese paragraphs do not specify 'owner or controller' of what: no operation is referred to in this section, only violations.''

We disagree that the proposed definition was without consistent context. However, we modified the proposed definition of ''ownership'' for the sake of simplification. Our definitions of ownership and control are not restricted to the implementation of section 510(c); rather, as explained above, the definitions also relate to the permit application requirements of section 507 and its implementing regulations. As such, while the definitions are of obvious importance to our implementation of section 510(c), we see no particular reason to define ownership or control exclusively in terms of that one section of the Act. At the same time, our definition of ownership is fully consistent with section 510(c).

As explained in more detail in section VI.F. of this preamble, we disagree with the argument that ownership of an entity does not equate to ownership of that entity's surface coal mining operations. Indeed, this argument was advanced and rejected in *NMA* v. *DOI II.* Under this final rule, as well as our previous rules, if a parent company owns or controls a subsidiary, the parent company is also a *de facto* owner or controller of the subsidiary's operations. The commenter's statement that under section 510(c) ownership means ownership of the mine operation begs the question: What does ''ownership'' mean? We answered that question by adopting a definition of ''*own, owner,* or *ownership*'' in this final rule. We chose to define the term and apply it in a manner which encompasses both direct ownership and indirect ownership through intermediary entities.

Finally, a commenter suggested, in substance, that we add ''may'' to the definition of ''ownership'' to clarify that the proposed factors do not always constitute ownership. We decline to adopt this commenter's suggestion. Our final definition of ''*own, owner,* or *ownership*'' comprises only two specific circumstances, which always constitute ownership. If the predicate facts are true, then the person is an owner. As such, there is no need to add ''may'' to the definition.

Comments on the Proposed Definition of ''Control''

Our final definition of control includes five categories of persons who are deemed to be controllers. Four of the five categories were proposed as examples of ownership or control; we

will address comments on the proposed examples in the relevant section below.

The one category that was not proposed as an example is paragraph (5) of the final control definition, which identifies as controllers those persons ''having the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.'' We modified and adopted this criterion from paragraph (b)(2) of the definition of control in proposed § 778.5. This provision is carried forward, in substance, from the ''deemed'' portion of our definition at previous § 773.5. In addition to the specific factors establishing control—*e.g.,* being a permittee, operator, etc.—it is important to retain a general category which allows regulatory authorities and the regulated industry to identify persons who have the ability to control a surface coal mining operation, regardless of their official title, label, or status. This will also allow regulatory authorities to consider specific facts pertaining to a relationship—such as the existence of personal relationships, informal agreements, and the mining histories of the parties in question—in determining whether control is present. In the absence of such a provision, persons could easily use creative titles or business arrangements to evade regulation.

Several commenters objected to the repeated use of the term ''controller'' in the proposed rule language. They said the use of the term ''controller'' is a new term or concept that represents an expansion of OSM's authority under section 510(c) of SMCRA, 30 U.S.C. 1260(c). Two of these commenters asked that we define ''controller'' in § 701.5 or stop using the term in the regulations. Other commenters noted that the proposed rule uses the terms ''ownership'' and ''control'' several times before defining them in § 778.5. Several of these commenters preferred that the term be eliminated but said that if it is used, it should only refer to an applicant.

We agree that ''control'' should be defined in § 701.5; for the reasons stated above we adopted this modification. Also, while the proposed definition of ''control'' encompassed the noun form of the word—''controller''—we modified the defined term to *control* or *controller* to remove any confusion. The modifications we adopted add to the clarity of the definition.

The term ''controller,'' as used in the proposal and this final rule, is not a new term or concept. The statuses and relationships which constituted control and the examples of control in the proposed rule were largely imported from the valid portions of our previous regulations. This final rule carries forward many of the control concepts contained in the valid portions of our previous regulations and the proposal. Further, as previously noted, since ''control'' is not defined in the Act, it is important for us to define the term so that we may adequately implement section 510(c) and other sections of the Act. We also disagree that ''controller'' should be used to refer only to an applicant. Persons other than applicants routinely own or control mining operations. To arbitrarily restrict the definition only to applicants would circumvent the plain meaning and intent of the Act.

Various commenters said the proposed definition of ''control'' was inconsistently used, over-broad, ambiguous, and inherently contradictory. These commenters also said the proposed definition contradicted the proposed definition of ''ownership,'' expanded the base for assignment of potential liabilities, and exceeded statutory authority. These and other commenters also suggest that the proposed definition was vague, and that the final definition should be clear and concise. One commenter said the vagueness of the proposal dooms its application as unlawful because it fails to provide fair notice of what is expected prior to any sanctions or deprivation of rights. Another commenter echoed the objection stating that because the proposed definition of ''control'' is vague, it could mean delays in permitting, as well as penalties and other sanctions, for failure to disclose all controllers in applications. The commenter said: ''Before the applicant is subjected to this sanction, it should be afforded an ample and complete opportunity to understand, clearly and concisely, the types of entities and relationships that OSM expects to be disclosed when the applicant submits its application.''

We disagree with these commenters. First, we are well within our statutory authority to define the terms ownership and control, which are not defined in the Act. Our final definition of ''*control* or *controller*'' is reasonable and fully consistent with section 510(c) of the Act, 30 U.S.C. 1260(c), as well as the two rulings of the D.C. Circuit in the *NMA* litigation. Second, as stated previously, the definition is logical, consistent, and well supported by our experience implementing SMCRA since its enactment in 1977. Also, this final rule substantially improves upon the proposal in terms of conciseness and clarity. We find nothing ''inherently contradictory'' about either the proposal or the final rule.

Also, this final rule does not expand ''the base for assignment of potential liabilities,'' as the commenters assert. As we stress throughout this preamble, the ownership or control definitions and permit eligibility aspects of this rule do not purport to hold a person personally liable for another person's violations. Rather, the definitions of ownership or control are relevant to, among other things, the information submission requirements for applicants and permittees, the section 510(c) compliance review obligations of regulatory authorities, regulatory authorities' findings of ownership and control, and challenges to ownership or control listings or findings. Despite the view of some commenters, denial of a permit does not equate to personal liability. True, the ownership and control information we receive may assist us in initiating enforcement actions under SMCRA, but that is entirely consistent with and appropriate under the Act. Indeed, the *NMA* v. *DOI II* court expressly upheld our right to require submission of information ''needed to ensure compliance with the Act.'' 177 F.3d at 9.

One of the commenters said the proposed definition of ''control'' is inconsistent with the way control information is used to determine permit eligibility. The commenter also asked whether a controller controls the operation as a whole, or just a part of an operation.

There is no precise correlation between the permit information disclosure requirements of the final rule and the section 510(c) permit eligibility determination required under final § 773.12. That is, the Act and our regulations require the submission of specific information, which the D.C. Circuit has ruled cannot form the basis of our permit eligibility determinations. For example, while we must still require certain information pertaining to persons who own or control the applicant, we may no longer routinely consider that information in the section 510(c) permit eligibility process. However, we have no authority to delete information disclosure requirements imposed by other sections of the Act. Furthermore, the information required by the Act and this final rule is pertinent to other statutory obligations beyond permit eligibility determinations, such as enforcement actions, including individual civil penalty assessments.

With regard to whether a controller controls the entire operation, or just a portion thereof, the answer is twofold.

For the most part, the persons identified in the deemed portion of the definition (paragraphs (1) through (5)), as well as the examples of control in paragraphs (5)(i) through (vi), will control the entire operation. However, we recognize that some persons will have control over a significant aspect of an operation, but not necessarily the entire operation. In light of this reality, and in response to several comments, we modified the proposal in key respects. As to the information submission requirements in final § 778.11(c)(5), we now allow applicants to identify the ''portion or aspect of the surface coal mining operation'' which their owners and controllers own or control. Further, in the final challenge procedures at §§ 773.25 through 773.28, we allow persons to challenge their alleged ownership or control ''of an entire surface coal mining operation, or any portion or aspect thereof.'' These requirements and procedures will allow regulatory authorities to link the proper persons to violations, as intended by section 510(c), and allow persons to challenge an ownership or control listing or finding by demonstrating that they do not own or control a particular portion or aspect of the operation. In our view, this approach properly takes into account the reality of ownership and control relationships in the coal mining industry.

Another commenter said the central focus in identifying control relationships should remain ''the capability of an entity to direct or affect the compliance status of the operations and activities of the nominal applicant, *i.e.,* to direct which reserves are to be mined, to design or control the manner of operation, to direct the flow of coal, etc.'' We agree that these are important factors in determining control; they are encompassed in paragraph (5) of the final definition of control.

A commenter noted that the proposed definition included those who ''own, manage, or supervise'' and asked if it is our ''intent to require the listing of mine management personnel responsible for day-to-day operating decisions at a mine.'' The commenter said that ''these are the people most often responsible for the causation and abatement of violations.''

The final definition of ''*control* or *controller*'' does not include the phrase, ''own, manage, or supervise.'' We also did not adopt the proposed example relating to persons who direct the day-to-day business of the surface coal mining operation. *See* proposed § 778.5(a)(2). If these persons are controllers, they will be covered under final paragraph (5) of the definition. We do not necessarily disagree with the commenter that mine management personnel are ''the people most often responsible for the causation and abatement of violations.'' However, these persons may not always be controllers of a surface coal mining operation. Instead, the controllers may be the persons who direct mine management personnel. Nonetheless, depending on the size of a company, the number of operators and employees at a site, or the delegation of authority within a company, mine management or other personnel may in fact have the ability to determine the manner in which a surface coal mining operation is conducted. The initial onus is on the applicant to identify its owners or controllers, consistent with the final definitions. *See* final § 778.11(c)(5). Regulatory authorities then have the authority to identify owners or controllers who might not have been disclosed. *See* final § 774.11(f).

A commenter objected to what the commenter called an ''ability to control standard.'' The commenter suggested that the standard should be actual control and not ability to control or influence. As explained above, we retained the ''ability to control'' concept at paragraph (5) of the final definition of ''*control* or *controller*.'' In our view, it is the power or authority to control, and not the exercise of control, which is the primary determinant of ''actual control.'' As previously explained, when we use the term ''actual control'' in this preamble, we are referring to both the exercise of control and the ability to control. The failure to exercise one's ability to control, when such control could be exercised, in order to prevent or to abate violations is of the same nature as an action causing a violation.

We also note that we removed the term ''influence'' from the definition of control. However, one of the examples of control refers to persons who contribute capital or other working resources and substantially influence the conduct of a surface coal mining operation. This example is discussed below.

The same commenter also said that the ability to control should be limited to the elements of an agency relationship ''established between the applicant and other persons.'' We disagree that ''control'' should be so narrowly defined. The definition we adopt today includes relevant agents of an applicant or permittee and all other persons who can determine the manner in which a surface coal mining operation is conducted. Our definition is reasonable and consistent with section 510(c) of SMCRA, 30 U.S.C. 1260(c).

A commenter suggested, in substance, that we add ''may'' to the definition of ''control'' to clarify that the factors in the proposed definition do not always constitute control. As stated above, our final definition of ''*control* or *controller*'' consists of a series of statuses or relationships which *always* constitute control (paragraphs (1) through (5)), and a series of examples in paragraphs (5)(i) through (5)(vi) which *may* constitute control. Use of the word ''may'' is appropriate when referring to the examples of control in paragraph (5), but it would be inappropriate in the other portions of the definition, since the identified statuses and relationships will, and do, constitute control in all cases.

Comments on the Proposed Examples of (Ownership or) Control

The proposed rule provided examples of ownership or control. *See* proposed § 778.5(a). In this final rule, we modified the proposed examples and moved them to the definition of ''*control* or *controller*'' to emphasize that they are more properly viewed as examples of control, not ownership. The examples now pertain only to paragraph (5) of the definition, which refers to a ''person having the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted.'' With respect to the conduct of surface coal mining operations, this criterion is the essence of ''control.'' Thus, when we refer to ''examples of control,'' we are referring to the examples enumerated in paragraphs (5)(i) through 5(vi) of the final control definition. The list of examples is not exhaustive; a regulatory authority retains flexibility to consider any and all facts or circumstances which may indicate that a control relationship exists.

General Comments on the Proposed Examples of Control

A commenter suggested that we adopt the first sentence in proposed paragraph (a): ''This part applies to any person who engages in or carries out mining operations as an owner or controller,'' but not adopt any of the eight proposed examples. The commenter said we should eliminate the examples and, ''in the spirit of primacy,'' leave it up to the regulatory authorities to determine who is an owner or controller. The commenter said the list of examples contains broad, vague, and potentially confusing definitions, and that ''definitions for 'ownership' and

'control' at [proposed] § 778.5(b)(1) and (2) provide [regulatory authorities with] sufficient guidance.''

We agree that the definitions of *''own, owner,* or *ownership''* and *''control* or *controller''* stand alone, but the examples are useful for both the regulated industry and regulatory authorities to consider in determining who may be controllers under paragraph (5) of the final definition of control. We derived the examples from our experience in implementing SMCRA since 1977 and from comments received on the proposed rule. We see no reason not to pass on the benefit of our experience, via the examples of control, to persons who have responsibilities under this final rule. We also note that regulatory authorities providing comments on the proposed examples of control did not raise concerns regarding State primacy.

A commenter said that OSM proposed eight categories of ''conclusively deemed 'owners or controllers.' '' The commenter argued that ''no manager or supervisor other than the mine manager [should] be considered a controller.'' Finally, the commenter also asserted that requiring permittees to notify the regulatory authority under proposed § 774.13(e) each time there was a change in personnel or in the ownership or control structure would impose a significant burden.

As explained above, we clarified that the examples at paragraphs (5)(i) through (vi) of the final control definition do not conclusively establish control. In addition, we did not adopt proposed § 774.13(e), which would have required updates of certain information, including changes of officers and directors, under the requirements for permit revisions. Instead, we adopted a notification-only process in final § 774.12 that is not subject to the application, notice, and public participation requirements for permit revisions. We disagree with the commenter's assessment that only a mine manager should be considered a controller; other managers and supervisors may well be controllers, depending on their responsibilities and conduct. Neither do we agree that the mine manager is always a controller. The definition we adopt today reasonably identifies persons who control a surface coal mining operation.

The same commenter expressed concern regarding OSM's attempt to distinguish between employees of mining operations and those who engage in or carry out mining operations. The commenter said its own ''participatory management style'' has '' 'pushed down' responsibility for many activities, including reclamation and environmental compliance, to the lowest possible level.''

A business entity is free to adopt any management model it desires. However, persons meeting the definition of ownership or control cannot escape their responsibilities under the Act simply because they choose unique management styles or ''push down'' their responsibilities to lower management levels. As explained above, the lower level employees to whom the commenter refers will not routinely be ''controllers'' under the regulatory definition. However, if these employees do in fact have the ability to determine the manner in which mining is conducted, then they have the authority and responsibility normally accorded to higher level managers. In such cases, they should be held accountable to exercise their authority and execute their responsibilities in ensuring that mining and reclamation are conducted in accordance with the requirements of the permit. However, the fact that subordinate employees may exercise control does not allow higher level managers, who have the ability to control those employees, to escape their status as controllers.

A commenter said that ''the 'control' parameters exceed the scope of SMCRA and violate the spirit, if not the letter, of (*NMA* v. *DOI I*), by allowing OSM to expand 'ownership and control' beyond the plain meaning and common legal interpretation of those terms.''

We disagree. We adopted limited and succinct definitions of ''*control* or *controller*'' and ''*own, owner,* or *ownership,*'' which are consistent with section 510(c) and other provisions of the Act. Also, neither the final definition of ''*control* or *controller*'' nor the supporting examples violates the D.C. Circuit's rulings in *NMA* v. *DOI I* or *NMA* v. *DOI II.* In *NMA* v. *DOI I*, the court did not invalidate the definition of ownership or control itself, just the application of the definition in the permit eligibility context. *NMA* v. *DOI I*, 105 F.3d at 694. The *NMA* v. *DOI II* court did rule specifically on our previous definition, but only in terms of our use of rebuttable presumptions. *NMA* v. *DOI II*, 177 F.3d at 5–7. In this final rule, we eliminated the use of rebuttable presumptions. Further, the court did not rule on any of the deemed categories of ownership or control, including paragraph (a)(3) of the definition at previous § 773.5, which defined ownership or control, among other things, as: ''[h]aving any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.'' We retained the substance of the previous (a)(3) category in paragraph (5) of the final definition of ''*control* or *controller.*''

A commenter said that the proposed rule: (1) Created newly defined persons and entities, (2) identified them as ''owners'' and ''controllers'' and (3) created ''novel enforcement tools'' that focus on the owners and controllers. The commenter also said OSM lacks the authority to extend the use of the terms ''owner'' and ''controller'' beyond section 510(c) of SMCRA, 30 U.S.C. 1260(c). We disagree. Neither the proposed rule, nor this final rule, creates newly defined persons or entities. Rather, we define ''*own, owner,* or *ownership*'' and ''*control* or *controller*'' in a manner which is fully consistent with section 510(c) of the Act (30 U.S.C. 1260(c)), the decisions of the D.C. Circuit in the *NMA* litigation, and fundamental tenets of corporate law. Also, we did not create ''novel enforcement tools.'' The enforcement provisions we adopt today at final part 847 are derived from the plain language of, and are fully consistent with, the Act. Finally, we also disagree that ''owner'' and ''controller'' are terms that must be confined to section 510(c), 30 U.S.C. 1260(c). As the D.C. Circuit expressly held, SMCRA's information requirements at section 507(b), 30 U.S.C. 1257(b), ''are not exhaustive,'' and OSM may require the submission of additional information ''needed to ensure compliance with the Act.'' *NMA* v. *DOI II*, 177 F.3d at 9. Under this rationale, the court upheld our previous information disclosure requirements, which required applicants to disclose information—including ownership and control information—beyond the requirements expressly set out in section 507, 30 U.S.C. 1257; this final rule carries forward much of our previous information provisions. As explained elsewhere in this preamble, the ownership and control information we require applicants to submit pursuant to final § 778.11(c)(5), (d), and (e) is necessary to enforce both section 510(c), and other provisions of the Act.

Several commenters claim that the proposed rule disregards the corporate form to impose personal liability on officers, directors, and shareholders (including parent corporations) of a corporation. Several of these commenters cited the decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), in support of their contention.

We disagree. Nothing in the permit eligibility provisions of this rule or in section 510(c) of the Act renders a

person legally liable or responsible for another person's outstanding violations. A finding of ownership or control under section 510(c) and this rule *does not* require a person subject to the finding to abate any violations (though he or she may be directly liable for abatement under other provisions of the Act). The permit eligibility aspect of this rule is not a direct enforcement mechanism brought to bear against owners or controllers since the permit eligibility provisions, which rely on the definitions of ''*own, owner, or ownership*'' and ''*control* or *controller*,'' cannot lead to an injunction or judgment against owners or controllers. They may, however, result in permit ineligibility pursuant to section 510(c)'s mandate that a permit ''shall not be issued'' if an operation owned or controlled by the applicant is currently in violation of the Act or other applicable laws. We also stress that owners or controllers may be subject to direct enforcement actions, as appropriate, under other provisions of the Act and our regulations.

United States v. *Bestfoods* assessed the standards to determine the financial liability of parent companies for the actions of their subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Unlike the provisions at issue in *Bestfoods*, our definition and the associated rules do not impose personal financial liability on officers, directors, or shareholders. It instead, determines when persons are eligible to receive permits under section 510(c) of SMCRA. Being ineligible to receive a permit based on ownership or control of operations with outstanding violations is not the same as being personally liable for the debts or wrongs of a corporation. As such, *Bestfoods* is simply not applicable to this rulemaking. Indeed, in *NMA* v. *DOI II*, which was decided *after* the decision in *Bestfoods*, the court upheld rules which allowed parent companies to be denied permits based on the violations of their subsidiaries. *NMA* v. *DOI II*, 177 F.3d at 4–5. The final rule adheres to this principle.

In a similar vein, two commenters said it is a misconception that persons who own or control a corporate permittee or operator thereby ''engage in or carry out'' the surface coal mining operations owned by that permittee or operator. In substance, these commenters believe that, under *Bestfoods*, ownership or control of an entity does not equate to ownership or control of the entity's operations.

Again, we disagree. This argument was presented and rejected in *NMA v. DOI II*, which was decided *after* the decision in *Bestfoods*. The court expressly upheld our previous regulations, which allowed for permit denials when an applicant indirectly owned or controlled ''downstream'' operations through ownership or control of ''intermediary entities.'' As such, the court expressly endorsed rules which allowed for permit denials based on ownership or control of entities, rather than direct ownership or control of operations. *NMA* v. *DOI II*, 177 F.3d at 4–5. The final rule adheres to this principle.

A commenter said that ''any suggestion that section 506 and section 510(c) together allow the agency to attribute the responsibilities of one who holds a permit (the ''permittee'') to anyone the agency deems as an owner or controller of mining operations is simply arbitrary.'' The permit eligibility aspects of this rule do not impose personal liability or responsibility on owners or controllers to abate or correct violations at operations they own or control, although they may be liable for abatement under other provisions of the Act and our implementing regulations. The preamble to this rule and the underlying proposed rule explain the rationale for each category of ownership and control.

A commenter asked the meaning of ''engages in or carries out.'' The commenter said that the language of the proposed rule does not distinguish between employees and those ''who OSM describes, under the amorphous phrase, as persons 'who engage in or carry out mining operations.'''' In an effort to simplify and clarify our final ownership and control definitions, we are not adopting the phrase ''engages in or carries out'' in the final regulatory language. The final definitions identify those persons who must be disclosed in permit applications as owners or controllers of the applicant.

Another commenter said that the proposed examples capture people who do not engage in or carry out surface coal mining operations, and thus fall outside the jurisdictional reach of SMCRA. The commenter said our definition should focus on actual control. The definition we adopt today does focus on actual control, which includes both the ability to control and the exercise of control.

Elimination of the Rebuttable Presumption for Ownership or Control

Paragraph (b) of our prior definition of ownership or control listed six relationships which were ''presumed to constitute ownership or control.'' 30 CFR 773.5 (1997). The presumption could have been rebutted if the person subject to the presumption could demonstrate that he/she in fact ''does not have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted.'' *Id.* Once a regulatory authority made a *prima facie* showing that the presumption applied because the person fit into one of the enumerated categories, the burden shifted to the person to disprove that he or she was an owner or controller. Our rationale for shifting the burden rested on our belief that the person subject to the presumption was most likely to have access to the information regarding the nature of the relationship and thus should bear the burden of producing evidence demonstrating a lack of control.

In our 1998 proposed rule, we proposed to eliminate rebuttable presumptions from our ownership and control definitions. See 63 FR 70604 for an explanation of our rationale. After the proposal was published, the *NMA* v. *DOI II* court struck down two of the previous rule's presumptions pertaining to officers and directors and 10 through 50 percent owners of entities. This ruling provided further impetus to move forward with our proposed elimination of presumptions.

Our final rule emphasizes that applicants have the burden to identify all owners or controllers in a permit application (see final § 778.11(c)(5)), which must be accurate and complete before a permit can be issued. SMCRA section 510(b)(1), 30 U.S.C. 1257(b)(1); final 30 CFR §§ 778.9(b) and 777.15(a). Further, if we find that there has been a knowing withholding of information required under 30 CFR part 778, including ownership or control information, we will refer the evidence to the Attorney General for prosecution under final 30 CFR 847.11(a)(3) and section 518(g) of the Act, 30 U.S.C. 1268(g). *See also* final 30 CFR 773.9(d). Also, regulatory authorities have the ability to later identify owners or controllers who were not disclosed in the permit application. The proposed provisions, taken together, will ensure that all owners and controllers are properly identified.

A commenter opposed eliminating the rebuttable presumptions, noting that rebuttable presumptions are an evidentiary tool used to shift the burden of producing information to the individual or individuals most likely to have access to information. The commenter also said OSM had not sufficiently justified eliminating the presumptions ''since the underlying questions of whether control exists or

not, and whether ownership exists or not, will still be required to be adjudicated.'' According to the commenter, the absence of presumptions of ownership or control would increase the burden on the agency to demonstrate the existence of the relationship. The commenter stated that the permit applicant should bear that responsibility under section 507(b) of the Act.

Consistent with the commenter's observation that persons subject to our previous presumptions were most likely to have access to pertinent information, applicants are also most likely to possess the knowledge and information necessary to determine their owners and controllers. Thus, this rule requires applicants to identify all owners and controllers and list them in the permit application. As explained above, the information submitted by applicants must be accurate and complete. If applicants properly identify all owners and controllers in a permit application, there is no additional burden on regulatory authorities. However, if an applicant fails to disclose an owner or controller, and a regulatory authority attempts to identify an owner or controller under final § 774.11(f), the regulatory authority will appropriately bear the initial burden of establishing the existence of the ownership or control relationship. The rule does not alter the burdens and responsibilities that section 507 of the Act assigns to permit applicants.

Another commenter stated that we should not eliminate the two presumptions that were not challenged by the National Mining Association, or the two presumptions on which we prevailed. The commenter suggested that as to the two presumptions which were invalidated, the court of appeals did not preclude regulatory authorities from making a finding that a 10 through 50 percent shareholder, officer, or director in fact owns or controls a violating entity.

The commenter presented no new arguments in favor of retaining the presumptions. Therefore, for the reasons set forth in the preamble to the proposed rule, the final rule does not include presumptions. However, we agree with the commenter that the court of appeals did not preclude regulatory authorities from making findings of fact with regard to persons covered by the invalidated presumptions. Nothing in the final rule precludes regulatory authorities from doing so. We also added final § 774.11(f) to allow regulatory authorities to make findings of ownership or control if the applicant fails to disclose all required ownership or control information in its application, or to update the information as necessary.

Proposed § 778.5(a)

Proposed § 778.5(a) stated that ''this part applies to any person who engages in or carries out mining operations as an owner or controller,'' and provided examples of owners or controllers to support the definitions of ''ownership'' and ''control'' at proposed § 778.5(b). Several commenters said that we should clarify that the persons identified in the examples ''are not automatically considered owners and controllers.'' We agree. As explained above, this final rule clarifies that the categories at paragraphs (5)(i) through (vi) of the final definition of ''*control* or *controller*'' are merely examples of those persons who could have control, they are not deemed categories of control.

Proposed § 778.5(a)(1)—Officers, Directors, and Agents

Our first example of owners or controllers was ''the president, other officers, directors, agents or persons performing functions similar to a director.'' We retained the substance of this provision as an example of control at paragraph (5)(i) of our final definition of ''*control* or *controller*.'' While we anticipate that the president of a business entity will almost always control the entity, a president will not necessarily do so in every instance. Therefore, we included presidents as an example of persons who may control an entity rather than classify presidents as ''deemed'' controllers.

Two commenters said that our statement in the preamble to the proposed rule that we do not intend for all employees to be identified in a permit application is inconsistent with our proposal ''to define 'owner or controller' to include agents'' and our ''acknowledg[ment] that all employees are 'agents.' '' According to the commenters, if agents are owners or controllers, and if all employees are agents, then the proposal would have required all employees to be identified in the application as owners or controllers. These commenters also said that ''the class of employees who actually engage in mining operations would include the very employees with the least ability to control the permittee's decisions concerning mining operations: equipment operators, pumpers, truck drivers, drillers, etc.''

We did not intend for every employee to be identified in an application. The final definition of ''*control* or *controller*'' lists agents are an example of persons who *may* have actual control. This rule does not require all agents or employees to be disclosed in a permit application, only those agents and employees who meet our final definition. As a general matter, our final definition does not encompass the specific employees identified by the commenters—''equipment operators, pumpers, truck drivers, drillers, etc.''—since these individuals typically do not have the ability to determine the manner in which a surface coal mining operation is conducted. Rather, these employees are typically under the supervision of, or take orders from, management personnel who do possess the ability to control the operation. However, should the responsibilities, duties, or actions of these employees meet the definition of ''*control* or *controller*,'' then they must be disclosed as, or may be found to be, controllers under final §§ 778.11(c)(5) and 774.11(f), respectively.

A commenter asked for an explanation of the phrase ''functions similar to a director.'' A corporate board of directors controls and manages the business affairs of the corporation in accordance with applicable State law, articles of incorporation, and corporate by-laws. The board of directors has ultimate decision-making authority with respect to significant corporate matters. The will of the board is usually manifested by a majority vote of the directors. A person, such as a director, cannot escape being a controller under this final rule by asserting that he or she is a member of a group, *e.g.,* a board of directors, and can only exercise authority collectively with the group. At final paragraph (5), we clarify that a controller is a person who has the ability, *alone or in concert with others*, to determine the manner in which a surface coal mining operation is conducted. Thus, if a director votes with the majority of the board, we cannot foresee an instance in which that director is not a controller of that particular aspect of the corporation's operations. However, a director who dissents with regard to a particular course of action—or can otherwise prove that he or she took meaningful actions to prevent or abate a violation—likely is not a controller as to that aspect of the operation.

The phrase ''functions similar to a director,'' which we borrow from section 507(b)(4) of the Act, 30 U.S.C. 1257(b)(4), clarifies that a person may have the functional power, but not the official title, of a director. In essence, a person who, alone in or concert with others, exercises final managerial control or authority over the affairs of a business entity—be it a corporation or

other entity—performs a function similar to a director.

Proposed § 778.5(a)(2)—Day-to-Day Activities

Our second example pertained to those ''persons who have the ability to direct the day-to-day business of the surface coal mining operation.'' We are not adopting this example because it is subsumed within final paragraph (5) of the control definition.

Proposed § 778.5(a)(3)—Permittees and Operators

Our third example encompassed permittees and operators. We decided to include permittees and operators in the deemed portion of the final control definition at paragraphs (1) and (2), respectively. There is no time when a permittee does not control its entire surface coal mining and reclamation operation. In addition, experience has demonstrated that there is no time when an operator does not control its own conduct on a surface coal mining and reclamation operation. However, we recognize that non-permittee operators will not necessarily control the entire operation. The final challenge procedures at §§ 773.25 through 773.28 allow persons, including operators who are listed as or found to be controllers, to challenge their alleged ownership or control ''of an entire surface coal mining operation, or any portion or aspect thereof.'' There were no specific comments on the proposed third example.

Proposed § 778.5(a)(4)—Partnerships and Limited Liability Companies

Our fourth example pertained to ''[p]artners in a partnership, the general partner in a limited partnership, or the participants, members, or managers of a limited liability company.'' Based in part on guidance from the D.C. Circuit in *NMA* v. *DOI II*, we moved the general partner in a partnership criterion to the deemed portion of the control definition at final paragraph (3). We retained the remainder of the proposed provision as an example of control at final paragraph (5)(ii).

With regard to our previous definition identifying general partners in a partnership as presumptive owners or controllers, the D.C. Circuit stated: ''As for subsection (4)'s presumption that control vests in each general partner, it naturally flows from 'the tenet of partnership law that a general partner has control of partnership affairs as against the outside world.' '' *NMA* v. *DOI II*, 177 F.3d at 7 (citations omitted). While the court was ruling in terms of a presumption of control, and not a category of deemed control, the court's statement clearly supports our inclusion of general partners of a partnership in the deemed portion of our control definition. Our experience in administering SMCRA also bears out this reality.

On the other hand, partners in a partnership and participants, members, or managers of a limited liability corporation will not always control the business entity, though they certainly might. Therefore, we included these persons as examples of potential controllers in paragraph (5)(ii) of the final definition.

A commenter said limited liability companies should not be treated in the same manner as limited partnerships, since, unlike limited partners, the individuals in a limited liability company do not retain the capability to make decisions. The commenter also said OSM should ''re-evaluate the historic policy of allowing new permits to be issued based only on the evaluation of the general partner in a partnership.'' Another commenter suggested that members of a limited liability company are often passive investors who ''have little to do with the functional operation of any company, let alone a mining company'' and ''know little or nothing about the mining industry, let alone having any control over an operation.''

The final rule defines owners or controllers of business entities or mining operations without any regard to the particular form of the business entity. Hence, we treat partners in a partnership and members of a limited liability company similarly to the extent that we include them as examples of persons who may control an entity. Under paragraph (5) of our final definition, control determinations rest upon a person's ability to determine the manner in which a surface coal mining operation is conducted, not the type of business entity or the person's title. It is incorrect to say that OSM's ''historic policy'' included only an examination of general partners in a partnership. While not specifically mentioned in a deemed or presumed category of ownership or control, regulatory authorities certainly had flexibility to determine whether other persons had authority to determine the manner in which a surface coal mining operation was conducted. *See* previous § 773.5, at paragraph (a)(3) of the ownership or control definition. Finally, we do not fully agree with the commenter's generalization that the members, managers, or participants in limited liability companies are merely passive investors with little involvement with a company's operations and little or no knowledge of the mining industry. If that statement is true in a given instance, then the person is highly unlikely to be a controller under our definition any way.

Proposed § 778.5(a)(5)—Contract Mining

Our fifth example pertained to ''persons owning the coal (through lease, assignment, or other agreement) and retaining the right to receive or direct delivery of the coal.'' We retained the substance of this provision as an example at paragraph (5)(v) of the final control definition. Under the final rule, persons who own or control the coal to be mined by another person through lease, assignment, or other agreement and have the right to receive or direct delivery of the coal after mining are potential controllers. The circumstance described in this example is generally referred to as ''contract mining,'' wherein an entity (generally referred to as a ''contract miner'' or ''captive contractor'') obtains a SMCRA permit in its own name, mines the coal belonging to another person (the owner or lessor), and must deliver the mined coal to that person or pursuant to that person's directions. The obligation to deliver the coal to the owner/lessor is often referred to as a ''captive coal supply contract.'' Generally, persons who have the ability to control contract miners are controllers who should be barred from receiving new permits under section 510(c) of the Act, 30 U.S.C. 1260(c), if they fail to prevent or correct violations. Further, most coal lessors who retain the right to receive the mined coal will be controllers because they have typically chosen to structure their relationship with an operator so as to retain the ability to control the mining operation.

Several judicial and administrative decisions support our inclusion of the contract mining example. For example, in *United States* v. *Rapoca Energy Co.*, 613 F. Supp. 1161 (1985) (''*Rapoca*''), OSM sued under section 402(a) of the Act, 30 U.S.C. 1232(a), to collect reclamation fees from the Rapoca Energy Company, which had contracted with others to mine the coal it owned. The issue was ''whether a large coal company that contracts with independent companies to produce coal that it owns or leases is an 'operator' responsible for the payment of [such] fees.'' *Id.* at 1163. Finding that Rapoca was liable for payment of the fees, the court stated:

> Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the

corresponding lack of freedom regarding the mining companies ability to sell to anyone other than Rapoca, this court must conclude that the ''independent contractors'' are no more than Rapoca's agents.

Id. at 1164.

Similarly, in *S & M Coal Co. and Jewell Smokeless Coal Co.* v. *Office of Surface Mining Reclamation and Enforcement*, 79 IBLA 350 (1984) (''*S & M Coal*''), the Department of the Interior's Office of Hearings and Appeals (''OHA'') held a lessor of coal liable for violations at a mining site even though the coal produced at that site was mined by another party pursuant to an oral contract. In reaching its decision, OHA noted that the lessor's employees took an active part in the planning and engineering functions in support of the mining operations. OHA also held that while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be based on past exercise of control and that it is important to determine the extent that a party can exercise control.

Several commenters said that the example should be deleted because it is ''unfair and discriminates against a coal company simply because it owns minerals, leases them, and happens to be in the business of selling coal.'' These and other commenters said, in substance, that retaining a right of first refusal to purchase coal from a third party, in an arm's length transaction, is not sufficient to establish control. Another commenter supported the example, agreeing that entities with an economic interest in the coal should be considered controllers to the extent that the entity does or can exercise control over, or derive benefits from, the mining operation.

We did not delete the contract mining example. Because owners or lessors of coal are not always ''controllers'' of contract mining operations, we included contract mining as an example of control in paragraph (5)(v) of the definition, rather than incorporating it into the deemed portion of the final definition of ''control or controller.'' However, when an owner or lessor of coal controls salient features of an operation performed by a contractor, a determination of control over the coal mining operation is justified and should be established. Our extensive experience evaluating and analyzing contract mining arrangements supports a conclusion that leasing coal combined with the right to receive or direct delivery of the coal generally establishes control. As to rights of first refusal, we agree that retaining such a right, in an arm's length transaction based on market conditions, will not, in and of itself, always establish control. However, a regulatory authority certainly has the authority to examine the particular circumstances to ascertain whether there are other indicators of control.

Another commenter said that:

> rights sold to mining companies specifically describe the rights of each party. It's exceedingly presumptuous to state that those who happen to own the coal also have control over compliance with regulations when the coal is mined. Those rights generally stay with the entity mining the coal.

We disagree. The terms of a contract may establish the rights of the parties among themselves, but these terms are not a conclusive determination of the responsibilities of the parties under SMCRA. A contract in which an owner or lessor of coal purports to contract away the obligation to comply with SMCRA does not mean that the owner or lessor is not a controller under section 510(c) of the Act, 30 U.S.C. 1260(c). Again, what is relevant under this rule is whether the owner or lessor has the ability to determine the manner in which a surface coal mining operation is conducted.

Proposed § 778.5(a)(6)—Contribution of Capital or Other Resources

Our sixth example pertained to ''[p]ersons who make the mining operations possible by contribution (to the permittee or operator) of capital or other resources necessary for mining to commence or for operations to continue at the site'' We retained the substance of this provision as an example at paragraph (5)(vi) of our final definition of ''control or controller.'' Under this final rule, persons who contribute capital or other working resources under conditions that allow that person to substantially influence the manner in which a surface coal mining operation is or will be conducted are potential controllers. We agree with commenters who suggested that influence is not equivalent to control; however, contribution of capital or other resources, coupled with substantial influence over the manner in which the surface coal mining operation is conducted, may be tantamount to control.

Numerous commenters said that OSM should not ''extend the 'ownership or controller' definition to utilities that have a captive coal supply contract.'' We deleted direct reference to captive coal supply contracts in this example. However, if a utility has a captive coal supply contract whereby it contributes capital to the operation, substantially influences the conduct of the operation, and can direct delivery of the coal, the utility is, in all likelihood, a controller under paragraph (5) of the final definition. That paragraph includes all persons and entities with the ability to control the manner in which the surface coal mining operation is conducted. A captive coal supply contract is typically indicative of a contract mining scenario, and may be covered under the contract mining example, which we discuss more fully above.

Numerous commenters said that OSM should not ''extend the 'ownership or controller' definition to mining equipment rental and leasing companies.'' One asked if equipment dealers who provide credit in exchange for a security interest are controllers of the mining operation. Another said that equipment leasing is a valid arm's-length contract.

We adopted a subparagraph within the final example to clarify that providing mining equipment in exchange for the coal to be extracted is a factor which may indicate control. However, under paragraph (5)(vi)(A) of the final definition, equipment dealers who sell or lease equipment in arm's length transactions, but do not receive the mined coal, will not be routinely encompassed within the definition of ''*control* or *controller*.'' To be classified as a controller, the person must have the ability to determine the manner in which the surface coal mining operation is conducted.

Three commenters said a family member or friend who provides a personal guarantee to obtain a reclamation bond should not be considered an owner or controller. Depending upon the circumstances of the guarantee, and the nature of the guarantor's relationship to the surface coal mining operation, a family member or friend may in fact be a controller. Again, the focus is on that person's ability to determine the manner in which the relevant surface coal mining operation is conducted.

Taking an opposing view, another commenter said that, in addition to personal guarantees to obtain a reclamation bond, the provision should also include ''any type of guarantor on an indemnity agreement to get a reclamation bond.'' The commenter also said any person ''or other entity who guarantees a bond should be listed under this provision.'' We decline to specifically add the language suggested by the commenter because persons who guarantee a bond generally do not have

the ability to determine the manner in which a surface coal mining operation is conducted. However, final paragraph (5)(vi) could encompass such persons, provided that they also substantially influence the conduct of the mining operation.

One commenter said this example should be deleted because none of the circumstances in the example ''necessarily mean[s] that an entity can exercise control over the day-to-day operations at a mine site.'' We agree that the examples do not constitute *de facto* control. The persons identified in the examples will only be controllers if, in addition to meeting the criteria in the examples, they also have the ability to determine the conduct of the mining operation.

A commenter asked if banks, other lending institutions, third parties that have never been to the mine, construction companies who lease equipment, limited liability partners in a leasing company, and utilities that receive 100 percent of a mine's production are all controllers. The commenter expressed concern that if all these entities are controllers, they all would then be required ''to submit signed, notarized certifications stating that they assume personal financial and criminal liability for a mine's transgressions.'' Other commenters said OSM should not ''extend the 'ownership or controller' definition to banks or any other lending institutions or to some individual who makes an arm's-length loan to a coal operator without any other 'control'.''

As to banks, lending institutions, and individuals who make arm's length loans, we revised the example in paragraph (5)(vi) of the final definition to include only these persons who contribute capital or other working resources under conditions that allow that person to substantially influence the manner in which the mining operation is conducted. Therefore, the mere act of lending money will not render a person a controller. Our previous discussion of other comments addresses the other scenarios posited by the commenters. Neither the proposed rule nor this final rule requires controllers to certify to personal financial or criminal liability.

Proposed § 778.5(a)(7)—Persons Who Can Commit Financial or Real Property Assets

Our seventh example pertained to persons ''who control the cash flow or can cause the financial or real property assets of a corporate permittee or operator to be employed in the mining operation or distributed to creditors.'' We retained the substance of this provision and, based in part on guidance from the D.C. Circuit in *NMA* v. *DOI II*, moved it to the deemed portion of the definition of ''*control* or *controller*'' at paragraph (4). Final paragraph (4) includes as controllers persons having the ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, permittee, or operator. This language largely mirrors one of our previous rebuttable presumptions of control. With regard to that presumption, the D.C. Circuit said:

> There is nothing strained about section (3)'s presumption that one ''[h]aving the ability to commit the financial or real property assets or working resources of an entity'' controls it. The ability to control assets goes hand-in-hand with control and is typically entrusted, along with general managerial authority, to a single officer, often the president.

NMA v. *DOI II*, 177 F.3d at 7 (citations omitted). While the court was ruling in terms of a presumption of control, and not a category of deemed control, the court's statement clearly supports our decision to include these persons in the deemed portion of our final control definition. Our experience in administering SMCRA also supports this action.

One commenter said the proposed example was vague. We disagree. The language in this final rule closely resembles and is consistent with the provision upheld by the D.C. Circuit, which found ''nothing strained'' about that provision.

A commenter asked if, under the proposed example, the following persons are ''controllers'': chief accountant; payroll clerk; customers, by virtue of paying their bills; coal company customers; a bankruptcy court ''authorized to disperse the assets of a company''; or a land agent who secures leases. As previously discussed, under paragraph (5)(vi) of the final definition, none of the listed persons would be considered controllers unless they have the ability to determine the manner in which a surface coal mining operation is conducted. The relevant inquiry is whether the person in question has the ability to commit the assets of a business entity in furtherance of the mining operation.

Proposed § 778.5(a)(8)

Our final proposed example pertained to ''[p]ersons who cause operations to be conducted in anticipation of their desires or who are the animating force behind the conduct of operations.'' We received many comments that said proposed § 778.5(a)(8) was ''difficult to understand and would be difficult to implement.'' We did not adopt this example because the concepts that we intended to convey in the proposed example are adequately captured in paragraph (5) of the final definition of ''*control* or *controller*.''

Final Paragraphs (5)(iii) and (5)(iv)—10 Through 50 Percent Ownership, Interlocking Directorates and Commonality of Officers

As explained above, we added two examples of control to this final rule. We addressed the first of these examples—10 through 50 percent ownership of an entity—in our responses to comments on our proposed definition of ownership. We added the second example—''an entity with officers or directors in common with another entity, depending upon the extent of overlap''—since interlocking directorates and commonality of officers tend to indicate that a control relationship may exist between two entities. However, as with our other examples, the mere existence of the factual scenario—*e.g.,* interlocking directorates—does not necessarily mean there is a control relationship. A person is not a controller under paragraph (5) of the final definition unless that person has the ability to determine the manner in which a surface coal mining operation is conducted.

''Federal Violation Notice'' and ''State Violation Notice''

We proposed to revise the definitions of *Federal violation notice* and *State violation notice*. Several commenters said *Federal violation notice* should specifically mean a Federal surface coal mining violation notice and that *State violation notice* should specifically mean a surface coal mining violation notice.

Upon further review, we determined that there is no need to define these terms. The definitions of ''violation'' and ''violation notice'' adopted in 30 CFR 701.5 of this final rule are sufficient. The commenters' concern is addressed in the context of the rules in which these terms are used. They include only violations in connection with a surface coal mining operation. Therefore, we are not adopting definitions for *Federal violation notice* or *State violation notice* and will remove these terms from our regulations.

Knowing or Knowingly

We proposed to replace the definition of *knowingly* in §§ 724.5 and 846.5 with a new definition of ''*knowing* or *knowingly*'' in 30 CFR 701.5. The final

definition of ''*knowing* or *knowingly*'' reflects the proposed rule, although we revised the text of the definition to read: ''*knowing* or *knowingly*'' means ''that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.''

We revised the definition to ensure that its applicability would not be restricted to ''violation, failure or refusal'' as that term is defined in 30 CFR 701.5. We removed redundant language. In addition, we replaced the word ''individual'' with ''person.'' The Act and our regulations define *person* in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this term. *See* 30 CFR 700.5 and SMCRA at section 701(19), 30 U.S.C. 1291(19).

Two commenters addressed the proposed definition. Both objected to the ''knowing'' standard being applied to ''administrative'' violations, violations which the commenters describe as those that do not cause environmental harm. One of the commenters observed that ''knowingly'' and ''willfully'' were originally associated with the issuance of individual civil penalties to the officers and directors of corporate entities.

The ''knowing'' standard appears in sections 518(e), 518(f), and 518(g) of the Act, 30 U.S.C. 1268(e), 1268(f), and 1268(g). There is nothing in any of these sections that would support a regulatory authority's use of this criterion to distinguish among violations when applying the ''knowing'' standard. Nor do we perceive the need to make such a distinction among violations of the Act and our regulations.

We agree that the ''knowing'' standard has been more visibly associated with individual civil penalties and corporate permittees. On February 8, 1988, at 53 FR 3664 *et seq.*, we adopted initial and permanent regulatory program provisions for individual civil penalties at 30 CFR parts 724 and 846. These regulations included definitions for ''knowingly'' and ''willfully.'' However, the ''knowing'' standard is employed in sections 518(e) and (g) of the Act, 30 U.S.C. 1268(e) and (g), not just in the individual civil penalty provisions of section 518(f), 30 U.S.C. 1268(f). Hence, the final rule broadens the applicability of the ''knowing'' standard because the standard is not exclusive to an individual civil penalty that may be assessed under section 518(f) of the Act, 30 U.S.C. 1268(f).

Link To a Violation

We proposed to add a definition of *link to a violation* to § 701.5. After considering the comments on the proposed definition and upon further deliberation, we are not adopting the proposed definition because the term is too closely associated with a previously defined term, *ownership or control link*, and the previous concept of presumptive ownership or control. The final rule does not use the term ''links'' and it eliminates the concept of presumptions.

Outstanding Violation

We proposed to add a definition for *outstanding violation*. Commenters expressed confusion about the meaning of this term and questioned its consistency with section 510(c) of the Act, 30 U.S.C. 1260(c). Upon further deliberation, we are not adopting the definition in this rulemaking.

Instead, when expiration of an abatement or correction period has significance, we use the phrase, ''violation that is unabated or uncorrected beyond its abatement or correction period.'' Under this final rule, the phrases ''outstanding violation'' and ''unabated or uncorrected violations'' are used interchangeably. The term ''outstanding violation'' means any violation that is unabated or uncorrected.

Successful Environmental Compliance

We proposed to add a definition of *successful environmental compliance*. However, we are not adopting the proposed rules that would have used this term. Since the term *successful environmental compliance* does not appear in the final rule, we are not adopting this proposed definition.

Successor in Interest

We proposed to revise the definition for *successor in interest*. A commenter said the term should be more thoroughly defined in terms of what is required in proposed § 774.17. Another commenter argued that, ''[t]he proposed definition fails to capture the language or the intent of the term used in the Act and the Congressional Record.'' The same commenter also said the definition alters the expressed intent of the Congress that there should be a brief but reasonable opportunity for a successor to continue the active mining operation while becoming the permittee.

After considering the comments on our proposed revision of § 774.17, we decided that transfer, assignment, or sale of permit rights and successor in interest issues require further study. As a result, we are not adopting either the proposed changes to those provisions, or the proposed revision of the definition of *successor in interest*.

Violation and Violation Notice

We proposed to revise the definition of *violation notice*. The proposed revision included a notice of bond forfeiture when the cost of reclamation exceeded the amount forfeited, or in States with bond pools, a determination that additional reclamation or reimbursement is required.

After considering the comments we received and the changes we made to other provisions of the proposed rule, we decided to adopt definitions of both *violation* and *violation notice*. We moved most elements of our previous and proposed definitions of *violation notice* to the new definition of *violation*.

In this final rule, we redefine *violation notice* to mean ''any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section.''

The final rule defines *violation* as that term is used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act, 30 U.S.C. 1257 and 1260(c), and related regulations. The definition specifies that the term *violation* includes: (1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person, and (2) a noncompliance for which OSM or a State regulatory authority has provided one or more of the following types of notices: (i) A notice of violation under 30 CFR 843.12; (ii) a cessation order under 30 CFR 843.11; (iii) a final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under 30 CFR part 845 or 846; (iv) a bill or demand letter pertaining to delinquent reclamation fees owed under 30 CFR part 870; or (v) a notice of bond forfeiture under 30 CFR 800.50 when (A) one or more violations upon which the forfeiture was based have not been abated or corrected; (B) the amount forfeited and collected is insufficient for full reclamation under 30 CFR 800.50(d)(1), the regulatory authority orders reimbursement of the additional reclamation costs, and the person has not complied with the reimbursement order; or (C) the site is covered by an alternative bonding system approved under 30 CFR 800.11(e), that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-

specific bond, and the person has not complied with the reimbursement requirement or paid any associated penalties.

With respect to notices of bond forfeiture, we recognize that the violation review criteria in the preamble to the previous rule at 54 FR 18440–41, (April 28, 1989) states that OSM and most States would only consider the first situation to be a violation notice. That is, there would have to be an unabated or uncorrected violation underlying a bond forfeiture before a notice of bond forfeiture could be considered a violation or a violation notice. However, the two new conditions under which a notice of bond forfeiture will be considered a violation or violation notice are appropriate because each of these situations involves (1) a failure to comply with requirements of the Act or regulatory program, and (2) a separate notification to the person who forfeited the bond or defaulted on the reclamation obligations.

Several commenters suggested that references to bond forfeitures, State bond pools, and cost of reclamation should be removed from the examples. For the reasons discussed above, we do not find adopting this suggestion to be appropriate. We revised these portions of the definition for clarity.

A commenter said the definition should include permit revocation orders and bond forfeiture notices in situations in which someone other than the permittee or its controllers ultimately abates or corrects the violation. The commenter said that abatement by a third party should not clear those responsible for the violation.

We agree only to the extent that an unabated or uncorrected violation (including unpaid fees or penalties) still exists or that a person has failed to comply with a cost reimbursement order from a regulatory authority. In terms of permit eligibility under section 510(c) of the Act, 30 U.S.C. 1260(c), the critical element is whether some type of violation remains unabated or uncorrected. In this context, the Act provides no basis for making distinctions based on the party completing the reclamation or abating or correcting the violation.

A commenter said that including bond forfeitures in the proposed definition of *violation notice* blurs what constitutes a notice of violation. For the reasons discussed above, we do not agree.

Another commenter argued that ''if there is an unanticipated change in circumstances, no 'violation' is involved until there has been a refusal or failure to comply with the notice.'' We disagree. The Act does not make the distinction that the commenter advocates. Furthermore, except for remining operations under section 510(e), the Act's permit eligibility requirements do not distinguish between violations resulting from unanticipated changes in circumstances and violations resulting from other situations.

Several commenters said the proposed definition of *violation notice* was too broad, and that orders, bills or demand letters for penalties and notices of bond forfeiture are already defined and have sanctions for failure to abate. We revised the definition to add more specificity and to restrict SMCRA-related violations to the circumstances under which a person receives the types of notice listed in the second paragraph of the definition.

One commenter agreed that the definition should not include bills or demand letters for delinquent reclamation fees. The commenter stated that OSM sometimes issues these bills and letters in error and that the Act does not mandate that we classify delinquencies as violations. Delinquent payment of reclamation fees is a statutory violation under section 402 of the Act, 30 U.S.C. 1232. Timely payment of reclamation fees and the penalty for delinquent payment is provided for under section 402(e) of the Act, 30 U.S.C. 1232(e). In addition, 30 CFR 773.17(g) establishes payment of reclamation fees owed under 30 CFR part 870 as a condition of permit issuance. We see no reason to treat this type of violation in a manner that differs from the treatment afforded to other violations.

A commenter also said that including unliquidated debt as a ''violation notice'' without requiring a notice of violation ''blurs State obligations and raises potential due process claims regarding notice of the remaining debt and opportunity-to-defend, that are better left avoided.'' As discussed at length in the preamble to the previous definition of ''violation notice'' published on October 28, 1994 (59 FR 54352), we disagree. No due process issues are raised in the definition of *violation* or *violation notice*. Everyone who receives one of the notifications listed in the definition of *violation* has the opportunity to take action to seek administrative or judicial review of the violation at that time.

This final rule demonstrates our enhanced emphasis on accurate and complete information. However, the final definition of *violation* does not include the failure to provide accurate and complete information, as originally proposed. We address this problem in other ways. For example, we will not grant a permit to an applicant who fails to provide accurate and complete information in an application. The applicant also may be subject to alternative enforcement action under section 518(g) of the Act, 30 U.S.C. 1268(g). In addition, when we discover a failure of this nature after a permit is issued, we may issue a notice of violation or, as appropriate, initiate other actions that may ultimately result in permit suspension or rescission.

Violation, Failure or Refusal

We originally proposed to retain the existing definition of *violation, failure or refusal* in § 846.5. We received no comments on this proposal.

In this final rule, for organizational reasons, we are moving the definition of *violation, failure or refusal* from §§ 724.5 and 846.5 to § 701.5 to consolidate our definitions. We are revising the language of the definition to confine its applicability to parts 724 and 846, as it is in the existing rules. We are also making a few non-substantive changes in wording to improve syntax and clarity and to remove redundant verbiage.

Willful or Willfully

We proposed to replace the definition of *willful* in §§ 724.5 and 846.5 with a similarly worded definition of ''*willful* or *willfully*'' in 30 CFR 701.5. The final rule reflects the proposed rule, with the changes discussed below. We are defining ''*willful* or *willfully*'' to mean ''that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted: (1) intentionally, voluntarily, or consciously; and (2) with intentional disregard or plain indifference to legal requirements.''

We revised the text of the definition for clarity and consistency with the term's broader applicability under the proposed and final rules. Most significantly, we replaced the phrase ''a violation of the Act, or a failure or refusal to comply with the Act,'' which could have been interpreted as limiting the scope of the definition to a violation, failure or refusal, as that term is defined in 30 CFR 701.5, with the phrase, ''a violation or the failure to abate or correct a violation.'' In addition, we replaced the word ''individual'' with ''person.'' The Act and our regulations define *person* in a manner that includes both individuals and business entities, as is appropriate in the context in which the Act and regulations employ this

term. See 30 CFR 700.5 and section 701(19) of SMCRA, 30 U.S.C. 1291(19).

Several commenters said that the definition should recognize but not apply to ''administrative'' violations, which, the commenters said, do not cause environmental harm. One said administrative violations must not be considered ''willful'' when determining a pattern of violations.

The ''willful'' standard appears in sections 510(c), 518(e), 518(f), and 521(a)(4) of the Act; 30 U.S.C. 1260(c), 1268(e), 1268(f), and 1271(a)(4). There is nothing in any of these sections that would support a regulatory authority's use of this criterion to distinguish among violations when applying the ''willful'' standard. Nor do we perceive the need to make such a distinction among violations of the Act and our regulations.

A commenter objected to the phrase ''or any Federal or State law or regulation applicable to surface coal mining operations'' in the proposed rule. In this final rule, we replaced the phrase ''or any Federal or State law or regulation applicable to surface coal mining operations'' with language that refers to a violation or the failure to abate or correct a violation. The context in which the term is used will determine the meaning of ''violation'' and the scope of the definition.

The same commenter further asserted that the proposed definition is inconsistent with section 518 of SMCRA, 30 U.S.C. 1268, which, according to the commenter, does not encompass every failure or refusal to comply with the Act or any Federal or State law or regulation applicable to surface coal mining operations. We do not agree with the commenter's characterization of the scope of section 518 of the Act. Furthermore, as discussed above, the Act also uses this term in sections 510(c) and 521(a)(4), 30 U.S.C. 1260(c) and 1271(a)(4). Section 510(c), specifically includes State violations.

Willful Violation

We proposed to remove the definition of *willful violation* from §§ 701.5 and 843.5.

A commenter argued that removing ''willful violation'' would ''improperly merge'' ''willfully'' and ''willful violation,'' which are distinct terms that the Act uses in different contexts. According to the commenter, the ''willful'' in ''willful violation'' in section 510(c) of the Act, 30 U.S.C. 1260(c), means that a person ''intends the result that actually occurs.''

We agree that context establishes meaning. However, we disagree that either term is used in a unique manner under SMCRA. As we stated above in the discussion of *willful* or *willfully*, the ''willful'' standard is employed four times in SMCRA, including section 510(c), 30 U.S.C. 1260(c). The previous definition of ''willful violation'' is inconsistent with how ''willful'' is used in sections 518 and 521 of SMCRA, 30 U.S.C. 1268 and 1271. The phrase ''willful violation'' appears only in section 510(c), where it is one criterion for permanent permit ineligibility.

In section 510(c), ''willful'' modifies ''violation'' in the same manner that ''demonstrated'' modifies ''pattern'' and ''irreparable'' modifies ''damage.'' The violations that would result in a finding of permanent permit ineligibility are not simply violations, they are willful violations. The type of pattern that must be determined is a demonstrated pattern. The damage that must result from the demonstrated pattern of willful violations must be irreparable damage.

We conclude that the previously defined term is now unnecessary. The new definition of ''*willful* or *willfully*'' includes an element of intent. There is no need to find that a person ''intends the result that actually occurs.'' Therefore, we are removing *willful violation* from §§ 701.5 and 843.5.

B. Section 724.5—Definitions

In this final rule, § 724.5 is removed from our regulations.

We proposed to replace the definitions of *knowingly* and *willfully* in § 724.5 with the definitions of ''*knowing* or *knowingly*'' and ''*willful* or *willfully*'' in 30 CFR 701.5. A commenter asked if the change was proposed because of unresolved bond forfeitures under the initial regulatory program. Our proposal had nothing to do with unresolved bond forfeitures. (The initial regulatory program did not require any bonds.) Instead, it arose from a desire to consolidate our definitions in § 701.5 to the extent possible.

The final rule replaces *knowingly* with ''*knowing* or *knowingly*'' and *willfully* with ''*willful* or *willfully*.'' As proposed, we are placing the final definitions in § 701.5 after them in § 724.5. In this final rule, we are also moving the definition of *violation, failure or refusal* previously in § 724.5 to § 701.5. The net result of these changes is that § 724.5 is removed from our regulations.

C. Section 773.5—Definitions

We proposed to either move or remove the definitions from previous § 773.5 and remove this section from our regulations. There were no comments on our proposal, which we adopted in revised form in this final rule.

We adopted certain definitions from previous § 773.5 in revised form at § 701.5 while removing the definitions of *ownership or control link, Federal violation notice*, and *State violation notice*. Section 773.5 remains a part of our regulations since we redesignated previous § 773.12 as § 773.5

D. Section 773.10—Information Collection

In this final rule, the provision we adopted from proposed § 773.10 is found at § 773.3.

We proposed to revise the information collection burden for part 773. We reorganized part 773. As a result, previous § 773.10 is redesignated new § 773.3. Final § 773.3 contains the information collection requirements for part 773 and the Office of Management and Budget (OMB) clearance number.

In this final rule, § 773.3(a) is revised to show that the new OMB clearance number for this part is 1029–0115. Section 773.3(b) is revised to adjust the estimated public reporting burden from 34 hours to 36 hours. The estimate represents the average response time. For unchanged provisions in the regulations, our revised estimates are based on updated estimates developed in May 2000 using more current information.

Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours for part 773 should be 50, instead of 34 hours. To reduce information requirements, we are not adopting some of the proposed changes in this final. We also increased estimates of burden hours for the remaining requirements.

A commenter stated that the time burden in § 773.10 differed from what was proposed in parts 774 and 778 and requested information on how these numbers were derived and a clarification of average reporting burden.

We receive approval from the OMB to collect information based on each ''part'' in the Code of Federal Regulations (CFR). There is a different burden associated with responding to

each part in the CFR since each requires different types of information from respondents (citizens, coal companies, State and Indian regulatory authorities). We also request approval from OMB based on the *average* burden hours per respondent, not the total burden. The total hours divided by the number of potential respondents equals the average burden hour estimate per respondent. For further information regarding our compliance with the Paperwork Reduction Act and OSM's information collection calculations, please contact OSM's Information Collection Clearance Officer identified under §§ 773.3(b), 774.9(b), and 778.8(b).

A commenter suggested that OSM lacked authority under SMCRA to collect much of the information required in the proposed rule. Our response to this comment relies on the decision in *NMA* v. *DOI II.* The court spoke directly on this issue saying that the information requirements contained in SMCRA are not exhaustive. So as long as the information required under our regulations is necessary to implement the Act, we are justified in requiring it. As explained elsewhere in this preamble, all of the information we obtain under this final rule is indeed necessary to enforce the Act.

Lastly, some commenters continue to assume that because OSM continues to require certain information, it will necessarily use that information to make permit eligibility determinations on surface coal mining permit applications. The commenters said this would be inconsistent with the court decision.

While we cannot use all of the information we obtain under this rule to make permit eligibility determinations under section 510(c) of the Act, 30 U.S.C. 1260(c), we are expressly required to obtain some of the information under section 507 of the Act, 30 U.S.C. 1257. Other information we obtain is necessary to enforce other aspects of the Act. The information we require will allow us and regulatory authorities to implement the purposes of the Act, including permitting, compliance, and enforcement provisions. As we have said, this is consistent with the decision in *NMA* v. *DOI II.*

E. Section 773.15—Review of Permit Applications

In this final rule, the provisions proposed at § 773.15 are found at §§ 773.8 through 773.15 and 774.11(c) through (e).

We proposed to revise certain aspects of previous § 773.15. In the proposed rule, we, among other things: (1) Provided for separate review of the legal identity, permit, and compliance information provided in applications; (2) separated permit eligibility determinations under section 510(c) of the Act from the application review process; (3) proposed to distinguish among applicants based upon surface coal mining experience and successful environmental compliance criteria; and (4) proposed the use of investigations to ensure compliance with certain statutory and regulatory provisions. The preamble of the proposed rule also provided notice that we would cease providing AVS and OSM recommendations to State regulatory authorities to assist in permitting decisions. *See also* OSM System Advisory Memorandum #20 (discontinuance of AVS and OSM permitting recommendations), a copy of which is in the administrative record for this rulemaking and on our Applicant/Violator System Office Internet home page (Internet address: www.avs.osmre.gov).

In this final rule, we modified the proposed revisions and reorganized them into smaller sections. As a result, part 773 is entirely reorganized and re-numbered. As part of the reorganization of part 773, some of the previous sections we did not propose for revision are also re-numbered. The new designations for these sections are incorporated in the derivation tables in section IV.B. of this preamble. We also modified certain proposed provisions to comply with the effects of the ruling of the D.C. Circuit in *NMA* v. *DOI II*; this final rule also conforms to the D.C. Circuit's holding in *NMA* v. *DOI I.*

As explained previously, in *NMA* v. *DOI I*, the appeals court held that the clear language of section 510(c), 30 U.S.C. 1260(c), of SMCRA authorizes regulatory authorities to deny a permit only on the basis of violations of ''any surface coal mining operation owned or controlled by the applicant.'' *NMA* v. *DOI I*, 105 F.3d at 693–94. In contrast, OSM's 1988 ownership and control rule also allowed regulatory authorities to deny a permit on the basis of violations of any person who owned or controlled the applicant. In the IFR, published in 1997, we cured the defect identified by the court of appeals by requiring regulatory authorities to deny permits based on section 510(c) of the Act only when the applicant owned or controlled an operation with a current violation, and not when a person with a current violation owned or controlled the applicant. In § 773.12(a) and (b) of this final rule, we retain the substance of this IFR provision.

In *NMA* v. *DOI II*, the court of appeals agreed with OSM that section 510(c) of SMCRA allows OSM to deny permits based on violations cited at operations that the applicant owns or controls, including ''limitless downstream violations'' at operations indirectly owned or controlled by an applicant through intermediary entities. *Id.* at 4–5. (A further discussion of ''direct'' versus ''indirect'' ownership or control appears below, in this section.) In final §§ 773.11, 773.12(a) and 773.12(b), we retain the substance of the existing provision (30 CFR 773.15(b)(1)), and proposed §§ 773.15(b)(3)(i)(A) & (B) and 773.16(a), which allow OSM to deny permits to applicants who are currently in violation and to applicants who—directly or indirectly—own or control operations that are currently in violation. OSM may consider violations at operations which are ''limitless[ly] downstream,'' so long as ownership or control (as defined in final § 701.5) by the applicant is present.

The court agreed with NMA that ''[f]or violations of an operation that the applicant ''has controlled'' but no longer does, * * * the Congress authorized permit-blocking only if there is ''a demonstrated pattern of willful violations''' under section 510(c) of SMCRA. *Id.* at 5. As such, in order to deny a permit under section 510(c) of the Act, the violation must be outstanding (*i.e.,* unabated or uncorrected) *and* the applicant must own or control the operation with a violation at the time of application. If the ownership or control relationship has been terminated, OSM may not deny a permit (absent a pattern of willful violations), even if the violation remains current. *NMA* v. *DOI II*, 177 F.3d at 5. However, if a person is himself a violator, severing an ownership or control relationship will not make the person eligible for a permit. OSM may not base permit eligibility on past ownership or control except in instances of a ''demonstrated pattern of willful violations of [the] Act of such nature and duration with resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of [the] Act.'' SMCRA section 510(c). As proposed, §§ 773.15(b)(3)(i)(A) and (B) and 773.16(a) would have allowed permit eligibility determinations to be based on past ownership or control. In final §§ 773.11, 773.12(a) and 773.12(b), we modified the proposed language to clarify that permit eligibility must be based on operations which the applicant or operator currently owns or controls. However, OSM may still consider past ownership or control of operations with violations in determining whether there

is a pattern of willful violations under section 510(c) of the Act and final § 774.11(c), except where constrained by the appeals court's retroactivity holding (discussed below).

On the applicability of the five-year statute of limitations at 28 U.S.C. 2462, the court agreed with OSM that the section 2462 limitations period does not apply to violations when determining permit eligibility under section 510(c) of SMCRA. *Id.* at 7–8. Thus, except where constrained by the appeals court's retroactivity holding (discussed below), OSM may deny permits to applicants who own or control an operation with a current violation, regardless of when the violation first occurred. On this point, since the court of appeals ratified the approach contained in the proposed rule, no modification was necessary in this final rule. Subject to the retroactivity holding, as reflected in final §§ 773.12(a) and (b), final §§ 773.12(a) and (b) allow OSM to deny permits based on violations at operations which the applicant currently owns or controls, regardless of when the violation was first cited.

With regard to retroactivity, the court found that the IFR, at 30 CFR 773.15(b)(1), is impermissibly retroactive to the extent it authorizes permit denials under section 510(c) of the Act based on indirect control in cases where *both* the assumption of indirect control and the violation occurred before November 2, 1988, the effective date of OSM's 1988 ownership and control rule. *NMA* v. *DOI I*, 177 F.3d at 8–9. The court explained that the 1988 ownership and control rule imposed a '' 'new disability,' permit ineligibility, based on 'transactions or considerations already past. * * *' '' *Id.* at 8.

Specifically, the court held that the IFR is retroactive ''insofar as it block [*sic*] permits based on transactions (violations and control) antedating November 2, 1988, the [1988] ownership and control rule's effective date.'' *Id.* Thus, under the court's reasoning, the IFR is retroactive only when *both* ''transactions''—the violation and the assumption of indirect ownership or control—occurred before November 2, 1988. Indeed, the court explained that the IFR is not retroactive to the extent it allows permit denials when an applicant acquires control of an ongoing (*i.e.,* unabated or uncorrected), pre-rule violation on or after the effective date of the 1988 ownership and control rule. *Id.* at n.12. This is so because one of the relevant transactions—assumption of control—will have occurred on or after November 2, 1988; thus, the applicant would be on notice of the requirements of the 1988 rule. By this same logic, the IFR also is not retroactive when the assumption of control occurred before November 2, 1988, but the relevant violation occurred or occurs on or after November 2, 1988. At bottom, if *either* of the relevant transactions occurred or occurs on or after November 2, 1988, OSM may continue to deny permits under section 510(c) without running afoul of the court's retroactivity holding.

The court's reasoning turns on the fact that permit denials based on *indirect control*, though reasonable, were first clearly provided for in the 1988 ownership and control rule. *Id.* In this regard, the court explains, the 1988 ownership and control rule imposed a ''new disability'' and ''change[d] the legal landscape.'' *Id.* (quotation omitted). However, even under the most restrictive reading of section 510(c), after enactment of SMCRA in 1977, OSM could always deny permits based on violations by the applicant's ''own, *directly* [owned or] controlled operations'' (*id.*) (emphasis added); indeed, the statutory language of section 510(c) expressly mandates permit denials in these circumstances.

As such, under the court's ruling, OSM may continue to require permit denials based on an applicant's own violations or *direct* ownership or control of operations with pre-rule violations, even when the applicant acquired ownership or control before promulgation of the 1988 ownership and control rule. For purposes of the final rule we are adopting today, and consistent with the *NMA* v. *DOI II* decision, an entity directly owns or controls another entity if it owns greater than 50 percent of the entity or actually controls the entity, and there is not an intermediary entity between the two. For example, if company A owns greater than 50 percent of company B, and there is no intermediary entity between the two, company A directly owns company B. If company A owns 50 percent or less of company B, but actually controls company B, and there is no intermediary entity between the two, company A directly controls company B. However, even if there is an intermediary entity, ownership and control will also be deemed direct if there is 100 percent ownership at each level of the corporate chain between two entities. For example, if company A owns 100 percent of company B, and company B owns 100 percent of company C, company A will be deemed to directly own and control company C, its wholly owned subsidiary.

While, in general, it is the presence of an intermediary entity, and not the percentage of ownership, which makes ownership or control indirect, we are adopting the ''greater than 50 percent'' threshold because greater than 50 percent ownership will usually confer control. The 50 percent threshold is also consistent with the definition of *own, owner*, or *ownership* we are adopting today in final § 701.5 and the position we have taken since 1988 that greater than 50 percent ownership is deemed to constitute ownership or control. *See* previous § 773.5(a) (this category of deemed ownership or control was not challenged by the National Mining Association). As such, as of the enactment of SMCRA in 1977, an applicant would be on notice that, at a minimum, it could be denied a permit if it owned greater than 50 percent of an entity with a current violation. In the case of wholly owned subsidiaries, any intermediaries will be disregarded since they are subject to total control by the parent company; in this instance, it is clear that the parent company will directly own, and have the ability to directly control, the entity at the bottom of the corporate chain.

Under the court's notice-derived rationale, OSM may also continue to deny permits based on *indirect* ownership or control of an operation with a current violation—even if both of the relevant transactions occurred before November 2, 1988—so long as there was a basis to deny under established law at the time of the assumption of indirect ownership or control or at the time of the violation (whichever is earlier), independent of the provisions of the 1988 ownership or control rule. To the extent that such authority to deny permits based on *indirect* relationships existed before November 2, 1988, the 1988 ownership or control rule cannot be said to have ''imposed a new disability'' or ''changed the legal landscape.'' Rather, the applicant would have been on notice that certain relationships to operations with current violations could result in a permit denial.

We modified proposed § 773.15(b)(3)(i)(B) to conform it to the court's retroactivity holding. Final § 773.12(a) and (b) incorporate the substance of the above discussion.

Other modifications to the proposed rule are discussed in connection with our responses to comments received with respect to the relevant proposed provisions.

General Comments on Proposed § 773.15

Several commenters, including those who commented on the effects of the *NMA* v. *DOI II* decision, expressed concern that OSM does not see that an

ineligibility determination based upon ''upstream'' violations is still possible. The commenters said: (1) The corporate form should not be used to perpetuate a fraud; (2) a corporate charter can be revoked; and (3) the decision in *NMA* v. *DOI I* specifically indicates how to determine the applicant. Other commenters raised similar concerns.

We agree that the corporate form should not be used to perpetrate a fraud. With respect to revocation of corporate charters, State regulatory authorities already have sufficient authority, under State laws, to seek revocation of corporate charters under appropriate circumstances.

We also agree that regulatory authorities have leeway to identify the true applicant, and to consider the violations of such person under the permit eligibility review of final § 773.12 and section 510(c) of the Act. We chose not to define the phrase ''true applicant'' at this time because regulatory authorities already have the authority and flexibility to determine the true applicant, based on the particular facts and circumstances of each case.

In *NMA* v. *DOI I*, the court of appeals explained that, as a general rule, OSM may not deny a permit based on violations of persons who own or control the applicant. However, the court explained: ''OSM has leeway in determining who the 'applicant' is. As appellant concedes, OSM has the authority, in instances where there is subterfuge, to pierce the corporate veil in order to identify the real applicant.'' *NMA* v. *DOI I*, 105 F.3d at 695. Below, we briefly describe several tools, which exist independently of this rulemaking—State and Federal corporate veil piercing and case law interpreting section 521(c) of SMCRA, 30 U.S.C. 1260(c)—which may assist regulatory authorities in identifying the true applicant.

The court of appeals identified corporate veil piercing as a means of identifying the ''true applicant.'' There are, generally speaking, two bodies of veil-piercing case law: State and Federal. However, the purpose of the State common law veil-piercing mechanism, which is typically employed as a method for imposing personal liability on shareholders of a corporation, does not precisely match the purpose and intent of this rulemaking. In promulgating the permit eligibility provisions of this final rule, we in no way intend to seek to impose personal liability on shareholders, or owners or controllers, for the wrongs or debts of a corporate permittee. Nor do we intend to alter the common law principles of corporate separateness and limited liability to a greater extent than SMCRA itself provides. Rather, the permit eligibility provisions we adopt today are designed to determine who is eligible to receive a permit under section 510(c) of SMCRA.

Despite the fact that the permit eligibility aspects of this rule do not impose personal liability on individuals for the debts or wrongs of a corporation, the body of State veil-piercing case law may, in certain instances, provide a useful analytical construct to assist regulatory authorities in identifying the true applicant. For example, in instances where State veil-piercing case law would allow the corporate form to be disregarded to impose personal liability on a person, it stands to reason that the person may be the true applicant, such that his violations become relevant to the permit eligibility determination under final § 773.12 and section 510(c) of the Act.

Federal veil-piercing, which serves a broader purpose than the imposition of personal liability for corporate debts or wrongs, is more closely aligned with the purpose of the permit eligibility provisions of this final rule; as such, it provides a better paradigm than State common law veil piercing for identifying the true applicant. Federal veil-piercing case law has developed to the extent that:

> The general rule adopted in the federal cases is that ''a corporate entity may be disregarded in the interests of public convenience, fairness and equity.'' In applying this rule, federal courts will look closely at the purpose of the federal statute [involved] to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine * * *.

Alman v. *Danin*, 801 F.2d 1, 3 (1st Cir. 1986) (quoting *Town of Brookline* v. *Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981); internal citations omitted). Under federal veil-piercing case law, if a person elects the corporate form to evade the requirements of SMCRA, it is in the interests of ''public convenience, fairness and equity'' to disregard the corporate form and consider the violations of the person, as the true applicant, in making a permit eligibility determination under final § 773.12 and section 510(c) of the Act.

Section 521(c) of SMCRA, 30 U.S.C. 1271(c), like veil piercing, allows for the imposition of personal liability in certain instances. The criteria for determining who is a section 521(c) ''agent,'' as they have developed in the case law, may assist regulatory authorities in their efforts to identify the true applicant. For example, in the case of *United States v. Dix Fork Coal Co.*, 692 F.2d 436 (6th Cir. 1982), the U.S. Court of Appeals for the Sixth Circuit found an individual directly liable for the violations of a corporation under section 521(c) of SMCRA, 30 U.S.C. 1271(c), which, under specified circumstances, allows the United States to institute a civil action for relief against a permittee or his ''agent.'' In that case, the individual—Wilford Niece—was neither an officer nor director of the corporation (Dix Fork), but was delegated ''responsibility [for] ensuring compliance with the Act throughout the mining operation by Dix Fork.'' *Id.* at 439. Borrowing from the definition of ''agent'' in the Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.*, the court explained:

> [A section 521] ''agent'' includes that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface coal mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of a permittee's mining operation.

Id. at 440. In finding Mr. Niece directly liable for Dix Fork's violations, the court explained that:

> The intervening corporate structure of Dix Fork is insufficient, given the aggravating circumstances of this case, to shield Wilford Niece from the affirmative obligations necessary to rectify the environmental hazard which would not have manifested but for the assets and decisions of Wilford Niece. * * *
>
> Refusal of the federal forum to implement affirmative obligations on Niece as an agent would permit circumvention of the Act through the establishment of a sham corporation.

Id. at 441. Since SMCRA itself disregards the corporate form to impose personal liability on section 521(c) agents for the wrongs of a corporation, it is reasonable to conclude that a section 521(c) agent may be the true applicant, such that his violations should be considered during the permit eligibility review under final § 773.12 and section 510(c) of the Act.

The tools identified above are not intended to be exhaustive. There may well be other mechanisms or procedures available to regulatory authorities to identify the true applicant. In most cases, the nominal applicant (the person whose name appears on the permit application) will also be the true applicant. Certainly, not all owners or controllers of an operation are susceptible to veil piercing or other corporate avoidance mechanisms; as such, not all owners or controllers are true applicants. However, if the regulatory authority has reason to

believe that the nominal applicant is not the true applicant, the regulatory should conduct an investigation to determine the identity of the true applicant. In short, each regulatory authority should consider the totality of circumstances in determining whether the nominal applicant is also the true applicant.

Proposed § 773.15(a)(3)

We proposed to add paragraph (a)(3) to the general requirements in previous § 773.15. That provision would have required the regulatory authority to evaluate whether the permit application contained accurate and complete information and allowed the regulatory authority to stop review until any issues as to the accuracy and completeness of information were resolved.

Based upon comments and our further deliberations, we are not adopting proposed § 773.15(a)(3) because it is duplicative. Commenters had varying opinions on the proposed revisions. Some said stopping the review would hasten correction of the information. One said the provision is unnecessary and redundant. This commenter said a regulatory authority already has the obligation to make a written finding for application approval ''and is under no obligation to proceed with an incomplete application.'' Two commenters expressed their belief that more time and resources would be required to determine that an application is accurate and complete before the review actually begins. Another commenter said that the ownership and control information should be reviewed for administrative completeness then entered into AVS. One commenter said the practice of providing a checklist instead of written findings should be eliminated in the final rule.

We agree, in part, with most of these comments. By our longstanding practice, at least since 1983, a regulatory authority is under no obligation to continue to process an administratively incomplete application. *See, e.g.,* final § 773.6(a)(1) (redesignated from previous § 773.13(a)(1)) and existing § 701.5 (definition of *administratively complete application*). We also included an administrative completeness requirement in final § 773.8(a) of this rule. Further, final §§ 773.8(b) and (c) require the regulatory authority to enter into AVS, and update, the ownership and control and violation information an applicant submits under final §§ 778.11, 778.12(c), and 778.14. Final § 773.15(a), which continues a provision which has also been in place since at least 1983 (*see* previous § 773.15(c)(1)), requires the applicant to affirmatively demonstrate, and the regulatory authority to find, that the application is accurate and complete before a permit is issued. In this final rule, at § 773.15(a), we made a technical revision to previous § 773.15(c)(1), changing the phrase ''complete and accurate'' to ''accurate and complete,'' to match the statutory phrase used in section 510(b)(1) of the Act. Finally, at final § 773.15(n), we added a requirement for the regulatory authority to make a written finding that the applicant is eligible to receive a permit based on the reviews under §§ 773.8 through 773.14 of this final rule. A checklist, without sufficient detail, will not satisfy the written finding requirement of final § 773.15(n).

Proposed § 773.15(b)

We proposed to revise certain provisions of previous § 773.15(b). In general, we proposed to:

- Reorganize the section to encompass, among other things, a three-part review of permit application information (*see* proposed §§ 773.15(b)(1) through (3))
- Revise our previous criteria for determining permit eligibility under section 510(c) of the Act (*see* proposed § 773.15(b)(3)(i); *see also* proposed § 773.16)
- Revise the circumstances under which an applicant with an outstanding violation could receive a permit (*see* proposed § 773.15(b)(3)(i)(B) and (C); *see also* proposed § 773.16(b))
- Revise our previous regulations pertaining to patterns of willful violations under section 510(c) of the Act (*see* proposed § 773.15(b)(3)(i)(D) through (F))
- Require regulatory authorities to investigate an applicant's owners or controllers to determine if they are responsible for outstanding violations and whether alternative enforcement actions are appropriate
- Impose special conditions on permits issued to applicants that did not have at least five years of mining experience or whose owners or controllers had not demonstrated successful environmental compliance (*see* proposed §§ 773.15(b)(2) and (b)(3)(ii)(C))

As explained in more detail below, we reorganized and modified the provisions proposed in § 773.15(b). In this final rule, we:

- Adopted the three-part review of permit application information (*see* final §§ 773.8 through 773.11)
- Consolidated and adopted provisions related to permit eligibility under section 510(c) of the Act (*see* final § 773.12)
- Adopted provisions whereby an applicant with an outstanding violation can receive a ''provisionally issued'' permit under certain circumstances (*see* final § 773.14, discussed in section VI.F. of this preamble)
- Adopted provisions relating to patterns of willful violations under section 510(c) of the Act (*see* final § 774.11(c) through (e), discussed in section VI.K. of this preamble)
- Did not adopt specific reference to investigations of an applicant's owners or controllers (though, under final § 774.11(b), if we discover that a person owns or controls an operation with an unabated or uncorrected violation, we will determine whether an enforcement action is appropriate)
- Did not adopt the five-year experience and successful environmental compliance criteria or additional permit conditions based on the applicant's mining experience and the compliance histories of the applicant's owners or controllers

General Comments on Proposed § 773.15(b)

A commenter said that OSM's rules should be altered only as necessary to fill the regulatory gap created by *NMA* v. *DOI I* and should recapture the linkages between permit applicants and their owners and controllers who are responsible for outstanding violations. The commenter said there is ample authority in SMCRA outside of section 510(c) to deny a permit to an applicant where an owner or controller of the applicant is responsible for an outstanding violation.

As mentioned above, this final rule fully complies with the D.C. Circuit's decision in *NMA* v. *DOI I*. In light of the fact that the *NMA* v. *DOI II* decision was issued after our proposed rule was published, modifications were required to conform this final rule to that decision as well. As previously noted, we reopened the comment period for this rulemaking in order to obtain public comments on the effects of the *NMA* v. *DOI II* decision. Further, rather than merely fill the ''gaps'' perceived by the commenter, we took the opportunity to improve upon other aspects of our previous regulations. This final rule is in full compliance with the court decisions, and also makes our previous procedures more efficient and effective.

We disagree that we should recapture linkages between applicants and their owners and controllers who are responsible for outstanding violations during the permit eligibility review required under section 510(c) of the Act. The *NMA* v. *DOI I* decision was clear on the point that we may no longer

routinely consider the violations of an applicant's owners or controllers during the section 510(c) compliance review. Nonetheless, as explained above, regulatory authorities have the authority, in appropriate circumstances, to identify the true applicant.

One commenter said the plain language of SMCRA does not limit permit ineligibility to current ownership or control of operations with violations. Other commenters, including those who commented on the effects of the *NMA* v. *DOI II* decision, said the final rule should only allow permit denials based on violations at operations which the applicant owns or controls at the time of application. One commenter said the court's ruling affects provisions in addition to the proposed permit eligibility provisions. Finally, a commenter expressed concern that, after the *NMA* v. *DOI II* decision, a permittee could fraudulently transfer a permit with a violation to a shell or dummy corporation and become permit eligible again.

Under *NMA* v. *DOI II*, as explained above, we may no longer routinely consider an applicant's past ownership or control of a violation during the permit eligibility review process. We may, however, consider such past ownership or control in determining whether there has been a pattern of willful violations under section 510(c) of the Act and § 774.11(c) of this final rule (which accommodates the appeals court's retroactivity holding). We modified the permit eligibility criteria of final § 773.12 accordingly, and have also modified all other proposed provisions affected by the court's ruling. As to fraudulent transfers to shell or dummy corporations, we are confident that regulatory authorities will not approve such transfers under existing 30 CFR 774.17 or the equivalent State counterparts. Also, as explained above, if a person is himself a violator, severing an ownership or control relationship will not make the person eligible.

A commenter said OSM should delete all ''administrative procedures'' imposed on itself and on State regulatory authorities—such as the proposed procedures for checking and recording data. The same commenter said OSM should also delete all references to investigations and referrals for prosecution, as well as any references to the review of outstanding violations of any person other than the applicant, persons the applicant owns or controls, or the alter ego of the applicant. The commenter said regulatory authorities do not need regulations for the procedures they will follow to check and record data; rather, these procedures should be left to policies and directives.

For the most part, we decline to adopt this commenter's suggestions. We do not believe the provisions of this section are so easily dismissed as ''administrative procedures.'' Rather, the procedures we adopt today are integral parts of the regulatory program to implement the provisions of SMCRA. Further, the procedures we adopt today provide necessary guidelines to regulatory authorities as to how to properly meet their responsibilities under these regulations.

We note, as indicated above, that we are not adopting direct reference to investigations in these provisions. The three proposed provisions in part 773 which referenced investigations are discussed more fully below at proposed § 773.15(b)(1)(i)(B).

Finally, a review of other outstanding violations, for example those of the applicant's or permittee's owners and controllers, may have utility outside of the permit eligibility context. For example, a review of the outstanding violations of an applicant's owners and controllers may reveal that enforcement actions are appropriate to remedy the violations. Also, the review under final § 773.11 requires an examination of the operator's compliance history, since an operator's violations may bear on the section 510(c) permit eligibility review under final § 773.12.

A commenter said that the sanctions for failing to identify owners and controllers—potential permit denial and referral for prosecution—are too stringent, in light of the fact that the standards for identifying owners and controllers are, in the commenter's view, ambiguous and uncertain.

It is appropriate to require applicants to disclose their owners and controllers in the first instance, based on the definitions of *own*, *owner*, or *ownership* and *control* or *controller* we are adopting today in final § 701.5. These definitions are sufficiently clear to put applicants on notice of the information which is required in a permit application. We removed the reference to criminal prosecution in these provisions. In most instances, if an applicant fails to provide required permit application information, the applicant simply will not receive a permit. However, there may be instances where prosecution for knowingly withholding or providing false information is warranted under final § 847.11(a)(3).

Several commenters suggested that it would be in the public interest for regulatory authorities to issue press releases to local newspapers when investigating ''AVS violations.'' They maintain that such press releases would heighten public awareness.

We do not believe that issuing press releases under such circumstances would be in the public interest. Announcing the pendency of an investigation before its conclusion could unfairly attach a stigma to a company or an individual who is ultimately vindicated. It could also compromise the integrity of the investigation. Balancing any advantage to be gained by such press releases against the potential to compromise the rights of the person being investigated or the integrity of the investigation, we conclude that the latter concerns substantially outweigh any perceived benefit. Nonetheless, the results of our investigations—*i.e.,* written findings on ownership and control under final § 774.11(f)(1)—will be entered into AVS. *See* final § 774.11(f)(2). Also, under final § 773.28(d), the result of any challenge to a finding on ownership or control will be posted on AVS and on OSM's Applicant/Violator System Office Internet home page (Internet address: www.avs.osmre.gov).

Several commenters asked if there is a penalty for States if they do not use AVS. AVS is a tool we developed specifically to assist States in implementing section 510(c) of the Act. After more than 13 years of successful operation, regulatory authorities now routinely use AVS to implement a variety of provisions under SMCRA. Given the efficiencies gained by using AVS, as opposed to independently and arduously compiling the information contained in AVS, it is highly unlikely that any State would choose to discontinue using AVS. Nonetheless, under our previous regulations, and the regulations we adopt today (*see* final §§ 773.9, 773.10 and 773.11), State regulatory authorities are required to use AVS during the section 510(c) permit eligibility review process. If they fail to do so, they are subject to OSM's general oversight authority.

One commenter said that AVS ''is an essential part of OSM's regulatory program.'' Another expressed concern that the proposed rule would weaken the effectiveness of AVS. This commenter also said the computer system gives small communities a way to identify corporate officials and investors who fail to abate violations or forfeit performance bonds. We agree that AVS is an essential part of our regulatory program and that it is an equally powerful tool for the public at large and the regulated industry alike. We want to assure the commenter that this rulemaking will not compromise

the integrity of the information contained in AVS in any way.

Two commenters asked how the final rule will affect existing permits. One of the commenters also asked: (1) what will happen to the current data in AVS for controllers; and (2) how will previous ownership or control links or links to violations discovered during bond forfeiture investigations be affected.

The provisions adopted in this final rule will become effective for Federal programs 30 days after the publication date of this final rule, and will apply prospectively. The rule will not affect existing permits, but will apply to Federal permitting as applications are received for new permits, renewals, revisions, transfers, assignments or sales. The rule will become effective in primacy States after we approve amendments to State programs, and will apply in the manner outlined above for Federal programs. This final rule will not affect the existing information shown in AVS, though it will affect how that information is used by regulatory authorities.

Proposed § 773.15(b)(1)

We proposed to revise previous § 773.15(b)(1) to provide for a three-part review of the information which applicants must provide under part 778. We adopted a general section to precede the three specific reviews, final § 773.8, and adopted the three specific reviews at final §§ 773.9 through 773.11.

We proposed that the review of an applicant's legal identity information would require an initial determination of whether information disclosed under previous § 778.13 is accurate and complete (proposed (b)(1)). We further proposed that after the preliminary determination, we would update the relevant records in AVS (proposed (b)(1)(i)). If we found that an applicant, operator, owner, controller, principal, or agent had knowingly or willfully concealed information about an owner or controller, we would: inform the applicant of the finding and request full disclosure (proposed (b)(1)(i)(A)), investigate to determine if full disclosure was made (proposed (b)(1)(i)(B)), and, if appropriate, deny the permit (proposed (b)(1)(i)(B)(1)) and refer the finding for prosecution under section 518(g) of the Act, 30 U.S.C. 1268(g), (proposed (b)(1)(i)(B)(2)). We modified the proposed revisions in this final rule. The proposed revisions, as modified, are at §§ 773.8 and 773.9 of this final rule.

We adopted final § 773.8 to provide general requirements which precede the three-part review of permit application information. At final § 773.8, we changed the proposed phrase ''accurate and complete'' to ''administratively complete,'' in response to comments, to highlight that the reviews of information are to commence after an application is found to be administratively complete. We recognized that a determination that an application is administratively complete occurs after an application is received but before we determine that the information is accurate and complete, based on a detailed examination of the information the applicant submits. A finding that the information is accurate and complete is part of the written findings required under final § 773.15(a). At final §§ 773.8(b) and (c), we adopted a provision requiring the regulatory authority to enter into AVS, and update, the ownership or control and violation information an applicant submits under final §§ 778.11, 778.12(c), and 778.14.

At final § 773.9, we adopted the proposed review of the applicant's ''legal identity information.'' For clarity, and to match the heading at final § 778.11, we changed the section heading to ''Review of applicant, operator, and ownership and control information.'' The final provision provides that the regulatory authority will rely upon the applicant, operator, and ownership and control information an applicant submits under final § 778.11, information from AVS, and any other available information, to review the applicant's and operator's business structure and ownership and control relationships. This review is required before making a permit eligibility determination under final § 773.12.

A commenter said that proposed § 773.15(b)(1) meant that all information must be found accurate and complete before an application is administratively complete. We modified the final rule language, as indicated, to require the reviews of information under final §§ 773.9 through 773.11 to proceed on the basis of an administratively complete application. *See* final § 773.8(a). The determination that an application is accurate and complete will come at a later stage of the permit application review process. *See* final § 773.15(a).

Several commenters asked OSM to clarify: (1) what is to be checked to determine accuracy and completeness; (2) how should States verify information provided in an application and to what depth and detail; and (3) how far above the applicant should ownership and control information be provided.

As indicated above, we changed ''accurate and complete'' to ''administratively complete.'' The term ''administratively complete application,'' and the requirement that an applicant must submit an administratively complete application before permit processing begins, have been in place since at least 1983. *See* previous § 773.13(a)(1) and existing § 701.5 (definition of *administratively complete application*). Under our longstanding practice, as well as under this final rule at § 773.8, an application is administratively complete when the regulatory authority determines that it contains information addressing each application requirement and all information necessary to initiate processing and public review. On the other hand, under final § 773.15(a), a determination of accuracy and completeness will occur before a permitting decision is made and will require written findings by the regulatory authority. This process, too, has been in place since at least 1983. *See* previous § 773.15(c)(1). When making a finding that an application is accurate and complete, rather than merely determining that information and responses have been provided, the regulatory authority must examine the veracity of submitted information. We leave it to the regulatory authorities to determine how this requirement is best implemented under their programs. However, in making a finding that an application is accurate and complete, a regulatory authority is expected to review all information supplied in the permit application, pertinent information in AVS, and all other reasonably available information. As for the extent of ownership and control information required to be provided for persons ''above the applicant,'' we note that under final § 778.11(c)(5) and (d), an applicant is required to submit the information required by final § 778.11(e) for all persons who own or control the applicant and the operator, according to the definitions of *own, owner*, or *ownership* and *control* or *controller* which we adopt today in final § 701.5.

A commenter said review of an applicant's legal identity will lengthen the permit review process and could require additional staff and resources to accomplish the required reviews and investigations.

As indicated above, at final § 773.9, we changed that heading to ''Review of applicant, operator, and ownership and control information,'' to more accurately reflect the nature of the review. Also, we removed direct references to investigations in this section, such that investigations will not be routinely required. Rather, while we fully expect investigations to be conducted when

warranted, investigations as proposed in part 773 are at the discretion of the regulatory authority. This should substantially alleviate the staff burden perceived by the commenter. As to the review of applicant, operator, and ownership and control information under final § 773.9, this final rule, in large part, continues requirements and practices which were previously in effect, and thus should not lengthen the review process or require additional staff and resources.

A commenter asked OSM to explain the term ''other reasonably available information.'' The commenter said that an application probably contains information more up-to-date than State databases, which are updated only once a year.

In final §§ 773.9 through 773.11, we use the phrase ''other available information'' instead of the proposed phrase ''other reasonably available information.'' However, the change was editorial in nature and does not change the scope of information the regulatory must consider. The phrase ''other available information'' is derived from section 510(c) of SMCRA, which requires regulatory authorities to consider the section 510(c) schedule of information submitted by the applicant, as well as ''other information available.'' Under final §§ 773.9 through 773.11, we intend that the phrase means information that may be obtained from State and Federal sources—such as AVS—without extraordinary effort. The term also encompass information supplied to the regulatory authority by the public.

Numerous commenters all said ''OSM should require States to validate their information before entry into AVS and should require the States to enter corrections in a timely manner.'' Final § 773.15(a) requires regulatory authorities to make a written finding that a permit application is accurate and complete. As explained above, when making a finding of accuracy and completeness, the regulatory authority must examine the veracity of information submitted by the applicant. In doing so, we expect regulatory authorities to consider all reasonably available information, including information already contained in AVS. We also note, however, that most of the information contained in AVS is supplied to regulatory authorities by applicants and permittees, who have the burden of providing accurate and complete information. We also agree that States should enter all data into AVS, including any corrections, in a timely manner.

Several other commenters said ''information should be required and entered into AVS at the time of permit application with a notation indicating that it will be updated before permit issuance, and that the information should be updated by the applicant and input at the time of final permit review and issuance.''

We modified several proposed provisions based on our modifications to proposed § 773.15(b)(1). Our modifications accomplish the intent of the commenters. Final § 773.8(b) requires the regulatory authority to enter into AVS permit application information relating to ownership and control and violations. Final § 773.8(c) requires the regulatory authority to update this information in AVS after it verifies any additional information submitted or discovered during a permit application review. Final § 778.9(d) requires an applicant, after permit approval but before permit issuance, to update, correct, or indicate that no change has occurred in the permit application information submitted under final §§ 778.11 through 778.14. Finally, § 773.12(d), which is modified and adopted from proposed § 773.15(e), provides that after a regulatory authority approves a permit, it will not issue the permit until the applicant complies with the information update and certification requirement of final § 778.9(d). After the applicant completes the update and certification, § 778.9(d) requires a regulatory authority, no more than five business days before permit issuance, to again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant's permit eligibility.

Proposed § 773.15(b)(1)(i)

We proposed to revise previous § 773.15(b) to provide for a finding whether any applicant or operator, or any owner, controller, principal, or agent of an applicant or operator, has knowingly or willfully concealed information about any owner or controller of the proposed operation. We did not adopt this provision in part 773 because it is duplicative of the provisions of final § 847.11(a)(3).

Several commenters asserted that denial of an incomplete application is mandatory when an applicant has not fully complied with, for example, sections 506, 507, 508, and 510 of SMCRA. 30 U.S.C. 1256, 10 U.S.C. 1257, 30 U.S.C. 1258 and 30 U.S.C. 1260. The commenters also said: ''To the extent that OSM proposes to make elective the rejection of the application by the agency where it is demonstrated that the applicant has failed to disclose information, the proposal falls short of the mark.'' The commenter noted the applicant is obligated to file accurate and complete information and that ''[n]on-disclosure which is intentional or which with reasonable diligence should have been avoided, should be the basis of . . . for referral by the agency for possible criminal prosecution for fraud or violation of the False Claims Act.''

We agree with the commenters' premise, but not with their conclusion. We agree that an applicant is initially obliged to file an administratively complete application and ultimately bears the burden of demonstrating that the application is accurate and complete. Absent a demonstration by the applicant that the application is accurate and complete, we agree that no permit may be issued by a regulatory authority. However, we disagree that a regulatory authority should immediately proceed to criminal prosecution in all instances of nondisclosure of required information. As mentioned above, the most common outcome for failing to provide accurate and complete information will be permit denial. However, if an applicant knowingly conceals or fails to provide material information, prosecution may be appropriate under final § 847.11(a)(3) and section 518(g), 30 U.S.C. 1268(g), of the Act. *See* section VI.AA. of this preamble.

A commenter said that making a finding that persons have knowingly and willfully concealed information from an application could be difficult without extensive administrative and legal research. The commenter also said that ''[c]onducting such research within statutory and regulatory time-frames mandated for permit reviews could require staff to spend less time on reviewing the technical, scientific, and regulatory adequacy of proposed operations.''

We expect the occurrence of knowing withholding of information to be relatively rare, and this rule does not require regulatory authorities to conduct an investigation of all applicants to determine whether information has been knowingly withheld. As such, the research to which the commenter refers should not substantially interfere with the regulatory authorities' other application review obligations. However, under final § 773.15(a), the regulatory authority must find that the information submitted by the applicant is accurate and complete. If a regulatory authority encounters evidence of wrongdoing or misconduct, the regulatory authority is obligated, under

SMCRA, to evaluate the circumstances and to take appropriate action under the Act.

A commenter objected to ''the inclusion of operators'' in proposed § 773.15(b)(1)(i). The commenter said including operators is both unnecessary and impermissible. The commenter said ''[i]f the operator is an agent of a permittee or an applicant, the operator will fall within the SMCRA provisions concerning agents. If not, the operator is outside the scope of SMCRA in this context.'' In final §§ 773.9 through 773.11, we modified the proposal to clarify that the regulatory authority will review the information the applicant submits under part 778. However, the applicant must provide information about its operator. We expect that the applicant will exercise due diligence to verify the accuracy and completeness of any information it receives from its operator. Ultimately, all of the information an applicant provides, including information pertaining to its operator, must be accurate and complete.

Proposed § 773.15(b)(1)(i)(A)

We proposed that following a finding of concealed information, we would inform an applicant or operator in writing of the finding to provide an opportunity to supply the undisclosed information before a permitting decision was made. There were no comments on this provision. We did not adopt this proposed provision because it unnecessarily duplicates existing procedures.

Proposed § 773.15(b)(1)(i)(B)

We proposed to provide for investigations as to whether an applicant's or operator's response to a finding of nondisclosure was satisfactory. All comments on proposed § 773.15(b)(1)(i)(B) addressed the proposed use of investigations to determine if an applicant provided full disclosure in response to a regulatory authority's written notification of a finding of less than full disclosure of owners and controllers. All comments on investigations proposed in §§ 773.15(b)(1)(i)(B), (b)(2)(iii), and (b)(3)(ii)(B) will be discussed together here.

Investigations

All comments on investigation, except one, variously questioned the reason for including this mechanism in the proposed revisions of previous § 773.15. Some commenters expressed concern that during oversight, OSM and State regulatory authorities would disagree with the conduct and results of investigations. Several commenters were concerned that additional staff and funding would be required to conduct the investigations. One commenter said that a mandate to investigate the information in every application is burdensome and that a State regulatory authority would, in fact, investigate when there was reason to believe that an application did not contain full disclosure. Some commenters asked about the scope and level of detail necessary to perform an investigation. One commenter said the final rule should clarify that a regulatory authority will conduct an investigation related to these provisions at its discretion. Several commenters expressed support for including investigations in the provisions and suggested that OSM or the State regulatory authority publish notices in local newspapers when an investigation is being conducted in order to increase public participation.

In response to these comments, we did not adopt the three provisions that made direct reference to mandatory investigations during the permit review process. Regulatory authorities already have the authority and discretion to perform an investigation, comprehensive review, examination or evaluation when they have reason to believe information in an application is not accurate or complete, or has been intentionally concealed. However, a regulatory authority's permitting decisions and all actions attendant to such a decision are subject to OSM's general oversight authority. In addition, for reasons explained above, we reject the suggestion to publish notification of a regulatory authority's investigations. Any benefit to be gained by such publication is outweighed by the countervailing concerns relating to the rights of the person being investigated and the integrity of the investigation.

Proposed § 773.15(b)(1)(i)(B)(1)

We proposed that, depending upon an applicant's or operator's response under proposed § 773.15(b)(1)(i)(A) and the results of our investigation under proposed § 773.15(b)(1)(i)(B), we ''may'' deny an application. We did not adopt this proposed provision. We decided that the proposed provision is an unnecessary revision because sufficient provisions already exist supporting the proposition that a regulatory authority is under no affirmative obligation to issue a permit when the application is not accurate and complete.

Proposed § 773.15(b)(1)(i)(B)(2)

We proposed that if we found knowing or willful concealment of ownership or control information, we would refer the finding to the Attorney General or equivalent State office for prosecution under section 518(g) of the Act and proposed § 846.11. We did not adopt this provision because it is duplicative.

Four commenters supported including a regulatory provision for referral for prosecution under section 518(g) of the Act. Three of the commenters said that the threat of being convicted on criminal charges will motivate coal companies to tell the truth in their applications for permits. We agree that it is appropriate to incorporate a regulatory provision implementing section 518(g) in this rulemaking, and have done so at final § 847.11.

Proposed § 773.15(b)(2) and (b)(2)(i)

We proposed § 773.15(b)(2) to provide for the review of an applicant's permit history, which comprises the second part of the three-part review of the information required from applicants under part 778. At paragraph (b)(2)(i), we proposed to use AVS and any other available information to review the permit history of the applicant as well as the permit history of any persons with the ability to control the applicant. We intended that the review would determine the extent of mining experience of the applicant and persons who own or control the applicant and whether previous mining was conducted in compliance with applicable requirements. We modified the proposed provisions in this final rule. Within the reorganization of part 773, the section is adopted as final § 773.10. We received no comments specific to proposed § 773.15(b)(2)(i).

Final § 773.10 provides for a review of ''permit history.'' Under final § 773.10(a), the regulatory authority will rely upon the permit history information the applicant submits, information in AVS, and any other available information to review the permit histories of the applicant and the operator. This review is required before a regulatory authority makes a section 510(c) permit eligibility determination under final § 773.12. Under final § 773.10(b) the regulatory authority will also determine whether the applicant, operator, and their owners and controllers have previous mining experience. If none of these persons has prior mining experience, the regulatory authority may conduct an additional review under final § 774.11(f) to determine if someone else controls the mining operation and was not disclosed under § 778.11(c)(5).

Proposed § 773.15(b)(2)(ii)

At paragraph (b)(2)(ii), we proposed that if an applicant had five or more years mining experience, the applicant would not be subject to additional permit conditions, as proposed at § 773.18, unless a controller of the applicant was linked to an outstanding violation. We specifically invited comments on the five-years experience and successful environmental compliance criteria.

Several commenters supported the five years experience and successful environmental compliance criteria to distinguish among applicants. Two of these commenters said the five-years criterion should be clarified to mean five consecutive years of surface coal mining experience. One commenter said that the experience criterion should be applied only to the applicant, not to the owners and controllers of the applicant. Another commenter said the five-year threshold should be applied only to the applicant, unless an investigation ''should prove that someone else is the true applicant.'' A group of commenters said that past performance can be a predictor of future performance. However, these last commenters also said that the proposal fails to address the core problem, which is how to prevent new permit-related damage by entities who are owned or controlled by violators, given that section 510(c) can no longer be used. These commenters suggested that if the intent of the proposed criteria was to reduce the risk posed by applicants with no mining experience or a history of unsuccessful compliance, perhaps performance bonds could be adjusted to address the increased risk.

Many more commenters opposed the five-years experience criterion. Numerous commenters all said mergers and name changes could create a new entity that would be unfairly subject to the criterion. Two commenters said that applicants identified in proposed § 773.15(b)(2)(ii) as subject to additional permit conditions differ from the persons identified in proposed § 773.18. Another said that existing State laws and regulations are sufficient to effect environmental compliance without additional permit conditions or monitoring. Two commenters asked if OSM relied upon statistical data to develop the five-year criterion. Numerous commenters said the five-year experience criterion is not authorized under the Act. Several commenters asserted that the experience criterion is inconsistent with the ruling in *NMA* v. *DOI I.* Several commenters said that ''all permittees should be subject to obligations to pay bills on time, to reclaim expeditiously, and to maintain proper compliance records. The agency cannot pick and choose who gets breaks from mandatory obligations.''

Another commenter asserted that SMCRA establishes the only permissible criteria for issuing and conditioning a permit to an applicant. In the commenter's view, our proposed criteria are not authorized by the Act. This commenter also said that there are other factors more relevant to an operation's financial and compliance success but even those factors are ''not part of the statutory calculus for a decision whether to issue or condition a permit. In any event, the statute directly addresses performance risk by requiring for every surface coal mining operation a reclamation bond payable to the regulatory authority and 'conditioned upon faithful performance of all requirements of the Act.' ''

Based on the comments received on this provision and our further deliberations, we are not adopting the proposed five-years experience and successful environmental experience criteria. There are no references to either in the regulatory language of this final rule. However, in final § 773.10(c), if neither the applicant or operator, nor any of their owners or controllers identified under final § 778.11(c)(5), has any previous mining experience, we may conduct an additional review to determine if another person with mining experience owns or controls the operation but was not disclosed under final § 778.11(c)(5). We also note that amendments to the existing bonding regulations, as alluded to by several commenters, may provide an adequate means of reducing the risk posed by applicants or permittees with little or no mining experience. However, bonding is outside the scope of this rulemaking.

Proposed § 773.15(b)(2)(iii)

All comments received on proposed paragraph (b)(2)(ii) addressed the proposed use of investigations. All comments on the proposed use of investigations have been discussed above at proposed § 773.15(b)(1)(i)(B), the first instance in proposed § 773.15 where the use of investigations was proposed.

Proposed § 773.15(b)(3)

We proposed to revise § 773.15(b)(3) to provide for the review of an applicant's compliance history, the third part of the review of an application. We modified and adopted this provision at final § 773.11, ''Review of permit history.'' Final § 773.11(a) requires a regulatory authority to rely upon the compliance, or violation, history information the applicant submits to review the compliance histories of the applicant, operator, and their owners and controllers. Under final § 773.11(b), this review must occur before a regulatory authority makes a section 510(c) permit eligibility determination under final § 773.11(b).

Proposed § 773.15(b)(3)(i)

We proposed paragraph (b)(3)(i) to provide that a regulatory authority must request a compliance history report from AVS for every application for a new permit, revision, renewal, transfer, assignment, or sale of permit rights. In this final rule, we modified the proposed provision to require regulatory authorities to obtain an AVS report before making a section 510(c) permit eligibility, whenever such a determination is required under our regulations, under final § 773.12.

General Comments on Proposed § 773.15(b)(3)(i)

Two commenters said the provisions proposed for the review of compliance history are not consistent with section 510(c) of SMCRA. First, they said permit revisions are exempt from a permit eligibility determination under section 510(c). One said that applications for permit renewals are also exempt. This commenter said proposed paragraph (b)(3) should be entirely deleted.

We disagree that permit revisions and renewals are exempt from the requirements of section 510(c). Section 510 refers generally to applications for permits and revisions. It is, therefore, reasonable to conclude that the term ''applicant'' in section 510(c) encompasses applicants for permits as well as revisions. Moreover, the term ''permit'' in section 510(c) does not exclude applications for permit revisions or renewals. It is reasonable to conclude that the requirements of section 510(c) apply with equal force not only to applications for new permits, but also to applications for permit revisions and renewals. In sum, while we did not include specific references to revisions, renewals, and transfers in the final rule language, we intend that a regulatory authority may evaluate all permitting actions for eligibility under section 510(c).

Permitting Recommendations

In the proposed rule, we provided notice that we would cease providing AVS and OSM recommendations to regulatory authorities on pending applications and other actions subject to permit eligibility determinations. We

provided official notice of the termination of permitting recommendations on October 29, 1999. *See* AVS System Advisory Memorandum #20. In the proposed rule, we explained that the AVS report which regulatory authorities are required to obtain under final § 773.11 (proposed § 773.15(b)(3)(i)) would replace OSM's current policy, which included providing permitting recommendations. After reviewing the comments received on the elimination of permitting recommendations, we will continue the practice of not providing recommendations, under the rationale we articulated in the proposed rule:

> In the future, instead of providing permit eligibility recommendations, we would use AVS to provide a variety of reports, including a report on applicants and violations on the operations they own or control, for use by the regulatory authority in reviewing applications and permits. Consistent with the principle of State primacy, regulatory authorities would then perform their own analyses of an applicant's legal identity information, permit history, and compliance history, and make permitting decisions based on their findings without receiving a recommendation from OSM. Our role would be to administer and operate the AVS and maintain the integrity of the system data. The State, subject to OSM oversight reviews, would have full authority in deciding whether to issue a permit.

63 FR 70580, 70593. We do note, however, that even when we were providing recommendations, the State regulatory authorities retained the ultimate authority to render a permitting decision.

Three commenters supported our decision to cease providing permitting recommendations. These commenters said the decision supported State primacy and that States should make their own permitting decisions. We supported the principle of State primacy in the past, and continue to do so, as evidenced by many provisions adopted in this final rule. For example, in addition to eliminating permitting recommendations, we provided that State regulatory authorities are to apply their own ownership and control rules to outstanding violations in other jurisdictions, including Federal violations, when deciding challenges to ownership or control listings and findings (*see* final §§ 773.25 through 773.28).

Our decision to cease providing permitting recommendations was also based upon the ever-increasing sophistication among State users of AVS. States have fully integrated the use of AVS into their programs. In addition, all information used in AVS data processing has been completely automated for several years. This has resulted in an exceptionally high degree of accuracy of the information contained in, and the reports generated by, AVS. The need for OSM to routinely check the quality of system outputs has continuously decreased, as has the need for OSM and State collaboration to resolve discrepancies.

Our role in maintaining and managing the computer system will continue. Nonetheless, the above-mentioned factors have brought us to the conclusion that it is appropriate to cease providing permitting recommendations. We remain committed to maintaining the integrity of AVS data and will continue to provide a variety of support services to State and Federal users, as well as to the industry and the general public.

Many commenters opposed or expressed concern regarding our decision to cease providing permitting recommendations. One commenter said that providing AVS and OSM recommendations is consistent with the Congress' view of OSM's role in primacy States. One commenter said: (1) AVS is an OSM system that can only be operated and maintained by OSM; (2) ceasing permitting recommendations will result in second-guessing State decisions during oversight; and (3) ''OSM should continue to use the data in its AVS system to provide permit eligibility decisions.'' Another commenter said that if OSM provides only raw data, some States may ignore violations in other States. Another commenter expressed concern about resolving data discrepancies.

We appreciate these concerns, but decline to reinstate permitting recommendations. Our response to these commenters is largely the same as our previous responses regarding recommendations. We do note that under this final rule, as with the previous rules, States are required to consider all violations, both State and Federal, during the section 510(c) compliance review (unless the violations are subject to one of the exceptions for remining (final § 773.13) or provisionally issued permits (final § 773.14)). If a State fails to consider all violations, it is subject to our general oversight authority. We also note our strong intent not to routinely second guess State permitting decisions; we will use our oversight to respond to egregious situations. So long as State permitting decisions are reasonable under the approved State program, we will not disturb the State decision-making process.

In the area of data discrepancies, the agency with jurisdiction over a violation is the first place to attempt to resolve any discrepancy. We are always prepared to receive any requests regarding Federal violations and to assist any State should the need arise.

Proposed § 773.15(b)(3)(i)(A)

At paragraph (b)(3)(i)(A), we proposed that a permit eligibility determination under section 510(c) would be based upon the compliance history of the applicant and operations owned or controlled by the applicant, unless there was an indication that the history of persons other than the applicant should also be included. Proposed § 773.15(b)(3)(i)(A), as modified, along with proposed § 773.16(a), as modified, is adopted in final § 773.12.

In final § 773.12, we clarified that we will consider an operator's compliance history, when the operator is different than the applicant, during the section 510(c) compliance review. As explained in section VI.A. of this preamble, there is no time when an applicant/permittee does not control its entire surface coal mining operation. As such, the permittee will always control the operator, at least to the extent that the permittee selects, and can ultimately fire, the operator. Since the operator is effectively ''downstream'' from the applicant/permittee, it is consistent with section 510(c) to consider the operator's compliance history, *i.e.,* whether the operator has any outstanding violations, during the section 510(c) compliance review. While reviewing the operator's compliance history was subsumed in the proposed provision, which would have required regulatory authorities to consider violations at all operations owned or controlled by the applicant, we decided to add specific reference to the operator to avoid any confusion. If we could not consider an operator's violations during the compliance review, operators could create violations at multiple sites and remain in the business by associating with ''clean'' applicants. The Act cannot be read to support such a result. The provision will also encourage applicants to hire ''clean'' operators.

A commenter asked that we explain which ''other persons'' we are referring to in proposed § 773.15(b)(3)(i)(A). The commenter said that without explanation, ''the regulations allow far too much leeway to the agency issuing the permit.'' By ''persons other than [the applicant],'' we intended to clarify that persons other than applicants for new permits may be subject to a section 510(c) permit eligibility determination. However, we decided that the reference to ''other persons'' is unnecessary in

final § 773.12 because other rule provisions already provide the circumstances under which a section 510(c) compliance review is required.

One commenter said that ''State law governs the analysis for piercing the corporate veil'' so that ''a Federal rule that attempts to displace State corporate law would be particularly intrusive and unjustified.'' This rule does not displace State corporate law to a greater extent than provided for in SMCRA. Further, as explained above, State common law pertaining to piercing the corporate veil is not the exclusive tool to determine the true applicant. It is true that corporations are creatures of State law; however, the corporate form cannot be used to evade the requirements of a Federal statute, such as SMCRA. To the extent that SMCRA is inconsistent with State corporate law principles, federal law prevents the provisions of SMCRA from being subverted by State law.

A commenter asked if the rule would allow for permit denial based only on the applicant's violations, or would it also allow for denial based on violations indirectly owned or controlled by the applicant. This final rule, like the provisions in the IFR, allows for permit denials based on ''limitless downstream violations'' at operations which the applicant owns or controls through intermediary persons or entities. This provision was expressly upheld in *NMA* v. *DOI II.* 177 F.3d at 4–5. Thus, during a section 510(c) compliance review under final § 773.12, we may consider not only the applicant's own, directly owned or controlled violations, but also violations at operations which the applicant indirectly owns or controls through intermediary persons or entities. This provision is subject to the court's retroactivity holding, as embodied in final § 773.12(a) and (b).

Proposed § 773.15(b)(3)(i)(B)

In paragraph (b)(3)(i)(B), we proposed that if an applicant or any surface coal mining operation owned or controlled by the applicant has an outstanding violation, the application may not be approved unless: (1) the regulatory authority with jurisdiction over the violation approves a properly executed abatement plan or payment schedule; or (2) the violation is being abated or is the subject of a good faith administrative or judicial appeal, contesting the validity of the violation; or (3) the violation is subject to the presumption of NOV abatement under proposed § 773.16(b).

We modified and reorganized the proposed provision. We consolidated all proposed provisions describing permit eligibility into final § 773.12. We moved proposed provisions regarding appeals, abatement plans, and payment schedules to final § 773.14. Section 773.14 governs the circumstances under which a permit may be provisionally issued, when an applicant or operator has outstanding violations. The adopted provisions of final § 773.14 are described below in the discussion of proposed § 773.16 at section VI.F. of this preamble.

In final § 773.12, we also changed the proposal's use of the past tense ''owned or controlled'' to the present tense ''own or control'' in order to conform the proposed provision to the ruling in *NMA* v. *DOI II.* In other words, the adopted language clarifies that we may no longer consider unabated or uncorrected violations at operations formerly, but no longer, owned or controlled by the applicant during the section 510(c) compliance review. We may, however, consider past ownership or control in determining if there has been a pattern of willful violations under final § 774.11(c) and section 510(c) of the Act.

Finally, we modified the proposed language to conform to the *NMA* v. *DOI II* court's ruling on retroactivity. Under this final rule, we may no longer deny a permit when an applicant assumed indirect ownership or control of an operation before November 2, 1988, and that operation has an outstanding violation which was cited before November 2, 1988, unless there was an established basis, independent from our 1988 ownership or control rule, to deny the permit at the time of the assumption of indirect ownership or control or at the time of violation (whichever is earlier).

A commenter who provided comments on the effect of the *NMA* v. *DOI II* decision said that under the court's retroactivity holding, our pre-1988 regulations only pertained to the applicant's violations. Another commenter said that the court's ruling ''did not prohibit imposition of permit blocks for direct ownership or control of violators whose violations occurred before [November 2, 1988].''

We agree with the latter comment. As explained above, the court found that the previous rule was impermissibly retroactive to the extent it required permit denials based on *indirect* control and transactions which occurred before November 2, 1988. Thus, the rule was not retroactive to the extent it required permit denials based on pre-rule transaction in instances involving *direct* control. Final § 773.12(a)(1) requires permit denial when the applicant directly owns or controls an operation with an unabated or uncorrected violation, regardless of when the ownership or control was established or when the violation occurred. The distinction between direct and indirect control is discussed more fully above.

A commenter said that proposed § 773.15(b)(3)(i)(B) appears to address an ''outstanding violation,'' but subparagraphs (B)(2) and (B)(3) appear to address only notices of violation. The commenter is correct that the proposal treated ''outstanding violations'' and ''notices of violation'' differently. We proposed to define *outstanding violation* to mean a violation notice that remains unabated or uncorrected beyond the abatement or correction period. As such, a notice of violation for which the abatement period has not expired would not have been an outstanding violation under the proposal. As previously explained, we are not adopting the proposed definition of *outstanding violation.* As such, the phrase ''outstanding violation'' will continue to have its plain meaning—*i.e.,* a violation that is unabated or uncorrected. Thus, under the final rule, an NOV is an outstanding violation, even if the abatement period has not expired. We also clarify that, under section 510(c) of the Act and our longstanding policy, regulatory authorities must consider notices of violation—and any other outstanding violations—during the section 510(c) compliance review (though the applicant may be eligible for a permit under final §§ 773.13 or 773.14).

Two commenters asked if the phrase ''may not approve'' in proposed § 773.15(b)(3)(i)(B) means that the regulatory authority has the discretion not to approve an application. The commenters said that if OSM is granting discretion to regulatory authorities in this matter, then it should be made clear in the final rule. In this final rule, denying a permit under § 773.12 is *not* discretionary. If a person is ineligible for a permit under final § 773.12, and does not meet the criteria of §§ 773.13 and 773.14, the regulatory authority must deny the application.

Several commenters opposed the presumption in proposed § 773.15(b)(3)(i)(B) that a violation is being abated ''merely because there is an abatement plan.'' They said the presumption should be that the violation exists until it is abated, ''not merely promised to be abated.'' These commenters also opposed the use of appeals to defer a finding of a violation. The commenters asked, ''when is a violation final enough to block issuance of a new permit?''

The proposed amendment provided for permit approval if an approved abatement plan or payment schedule is

in place to correct a violation which remains unabated beyond the abatement period, or the violation is subject to a good faith appeal, at the time a permitting decision is made. In our view, the presence of an abatement plan or payment schedule demonstrates a good faith effort to correct a violation. We conclude that this current practice should continue. We also conclude that it is appropriate to provisionally issue a permit when a violation is subject to a *good faith* appeal. However, under final § 773.14(c), if a permittee, operator, or other person fails to comply with an abatement plan or payment schedule, or if a court affirms the existence of a violation properly attributable to the applicant, then a regulatory authority should pursue other means to compel compliance, and must institute procedures to suspend or rescind the provisionally issued permit. *See* section VI.F. for a detailed discussion of provisionally issued permits.

Proposed § 773.15(b)(3)(i)(C)

At proposed paragraph (b)(3)(i)(C), we proposed that any application approved with outstanding violations must be conditioned under § 773.17(j). Because we are not adopting proposed § 773.17(j), we also are not adopting proposed (b)(3)(i)(C). There were no comments on this proposed provision. Permits which are issued when there are outstanding violations properly attributable to the applicant under section 510(c) must be provisionally issued in accordance with final § 773.14.

Proposed § 773.15(b)(3)(i)(D), (E), and (F)

We preserved the substance of these proposed provisions at final §§ 773.12(c) and 774.11(c) through (e). In proposed subparagraphs (b)(3)(i)(D), (E), and (F), we provided that OSM will serve a preliminary finding of permanent permit ineligibility under 43 CFR 4.1351 when we find that an applicant or operator owned or controlled mining operations with a demonstrated pattern of willful violations of the Act and its implementing regulations, and the violations are of such nature and duration that they result in irreparable damage to the environment so as to indicate an applicant or operator's intent not to comply with the Act or implementing regulations. We further proposed that a person would be able to request a hearing under 43 CFR 4.1350 through 4.1356 with the Office of Hearings and Appeals within 30 days of receiving a preliminary finding under paragraph (3)(i)(D) of this proposed section. If a request for a hearing is filed, the Office of Hearings and Appeals would give written notice of the hearing to an applicant or operator and issue a decision within 60 days of the filing of the request for a hearing. We further proposed that a person may appeal the decision of the administrative law judge to the Interior Board of Land Appeals under procedures in 43 CFR 4.1271 through 4.1276 within 20 days after receipt of a decision. The provisions were based upon previous § 773.15(b)(3) and were proposed with only minor, non-substantive changes from the previous provisions. As mentioned, we adopted the provisions, without substantive modification, in final §§ 773.12(c) and 774.11(c) through (e).

A commenter asserted that the finding would require an investigation and extensive staff resources. These are not new provisions. The proposed provision at § 773.15(b)(3)(i)(D) and the final provisions at § 774.11(c) through (e) are derived from previous § 773.15(b)(3), which implements the ''pattern of willful violations'' aspect of section 510(c) of SMCRA. There are no substantive changes from the previous provisions, except that we modified the provision to conform it to the appeals court's retroactivity holding. We note that compliance with the provisions is not discretionary, as they are necessary to implement section 510(c)'s mandate. As such, although an investigation requiring staff resources may be required in certain instances, this result is unavoidable under the Act.

A commenter who provided comments on the effect of the *NMA* v. *DOI II* decision suggested that the rule require regulatory authorities to evaluate past ownership or control of operations in violation and make a written finding if there is a pattern of willful violations. Consistent with *NMA* v. *DOI II*, final § 774.11(c) requires regulatory authorities to consider past ownership or control in determining whether there has been a pattern of willful violations under section 510(c). However, we adopted language in final § 774.11(c) to comply with the court of appeals' retroactivity holding. Thus, when determining whether there is a pattern of willful violations, we will only consider ownership and control relationships and violations which would make, or would have made, the applicant ineligible under final § 773.12, which incorporates the substance of the court's retroactivity holding. Final § 774.11(c) also requires regulatory authorities to serve a preliminary finding of permanent permit eligibility if such a pattern exists.

A commenter said the ''use of the word 'irreparable' should be replaced with 'material damage.' Irreparable is not the only damage which should not be tolerated. Property owners have to put up with all kinds of illegal damages because they are not significant enough. Material damage may affect many more properties than irreparable damage.'' We note that section 510(c) of the Act uses the term ''irreparable damage.''

Proposed § 773.15(b)(3)(i)(G)

We proposed subparagraph (b)(3)(i)(G) to provide that a person is not eligible for a permit if the person or anyone proposing to engage in or carry out operations on the proposed permit has been barred, disqualified, restrained, enjoined, or otherwise prohibited from mining by a Federal or State or court.

We are not adopting the proposed provision. We decided that there are sufficient existing authorities to allow regulatory authorities to avoid violating court orders or injunctions or aiding and abetting enjoined individuals in violating injunctions. For example, if an owner or controller of an applicant is enjoined by a court from engaging in surface coal mining operations, granting a permit to the applicant may be viewed as violating the injunction. Even if the regulatory authority processing the permit application is not technically bound by the injunction, granting a permit may nonetheless be viewed as aiding and abetting an enjoined individual in violating an injunction. Because the specific terms of an injunction will be outlined in the court's order, the regulatory authority must decide, on a case by case basis, whether the order prevents it from issuing a permit.

Proposed § 773.15(b)(3)(ii)

We proposed subparagraph (b)(3)(ii) to provide for an examination of an applicant's controllers. We proposed to ask for an AVS report to show if an applicant's owners or controllers owned or controlled a surface coal mining operation when a violation notice was issued and if the violation is outstanding. We further proposed to investigate each person and violation to determine whether alternative enforcement action under proposed part 846 is appropriate and to enter into AVS the results of each determination or referral. We further proposed that if an applicant has less than five years experience, or has owners or controllers that are linked to outstanding violations, we would consider the applicant to have insufficient or unsuccessful environmental compliance and, if approved for a permit, subject such applicant to additional permit conditions under proposed § 773.18.

In this final rule, we are not adopting direct references to investigations, the five-years experience criterion, the successful environmental compliance criterion, or additional permit conditions. We adopted the remaining provisions, as modified, at final § 774.11(b). Under final § 774.11(b), if we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine if an enforcement action is appropriate under parts 843, 846, or 847. We must enter the results of any enforcement action in AVS. *See also* the description of final § 774.11(b) in section VI.K. of this preamble.

A commenter said the proposed provision seems to be inconsistent with the ruling in *NMA* v. *DOI I*, ''especially if the applicant is part of a large corporate family where the same individuals hold officer positions in several of the companies.'' The commenter suggested that outstanding violations should be considered only if they were issued to the applicant or any operation owned or controlled by the applicant. The commenter further said that ''[v]iolations at other operations of an applicant's parent or sister companies must not be considered if their only connection to the applicant is a common individual officer or ''controller.'' To do so would have the same result as the previous regulation which denied permits if anyone owning or controlling the applicant had outstanding violations. This concept was disallowed by the court decision in *NMA* v. *DOI [I].*''

The provisions adopted at final § 774.11(b) are unrelated to permit eligibility determinations. Rather, the final regulations at § 774.11 provide that regulatory authorities may determine whether enforcement actions are appropriate under 30 CFR 843.13 and parts 846 and 847, which implement sections 518 and 521 of the Act. The ruling in *NMA v. DOI I* does not alter our statutory authority to pursue enforcement actions under sections 518 and 521.

Proposed § 773.15(b)(4)

We proposed to revise previous § 773.15(b)(4) by correcting the date in previous subparagraph (b)(4)(i)(C)(1) to read ''September 30, 2004.'' In the reorganization of part 773, we moved the provisions in previous paragraph (b)(4) to a separate section, final § 773.13. We adopted the date correction at final § 773.13(a)(2)(i) and also modified and reorganized the prior provisions for increased clarity. The substance of the final provision is unchanged.

Final §§ 773.15(a) and (n)

Under the reorganization of part 773 in this final rule, the provisions in previous § 773.15(c) are placed in a separate section. The section appears at final § 773.15. In this final rule, we also adopted two amendments at final § 773.15. In final § 773.15(a), we made a technical revision to previous § 773.15(c)(1), changing the phrase ''complete and accurate'' to ''accurate and complete,'' to match the statutory phrase used in section 510(b)(1) of the Act. We added final § 773.15(n) to require a written finding based upon the results of the reviews under §§ 773.8 through 773.14.

Proposed § 773.15(e)

We proposed to revise paragraph (e) of previous § 773.15 to require regulatory authorities to obtain an AVS compliance report no more than three days before a permit is issued. Our intent was to ensure, immediately before permit issuance, that no new violations have been cited at operations which the applicant or operator owns or controls since the initial section 510(c) compliance review.

We modified the proposed provision in the final rule. The final provision, at § 773.12(d), provides that after a regulatory authority approves a permit, it will not issue the permit until the applicant complies with the information update and certification requirement of final § 778.9(d). After the applicant completes the update and certification, § 778.9(d) requires a regulatory authority, no more than five business days before permit issuance, to again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect the applicant's permit eligibility.

We increased the proposed three days to five days in response to comments on the proposed provision. The final compliance history report should be obtained close to the anticipated date of the permitting decision. Five days provides a better opportunity to review the compliance report and resolve any discrepancies that arise before a final permitting decision is made. The purpose of the second compliance history report is to make sure that the applicant and operator, and operations they own or control, continue to be in compliance. If there are compliance problems identified in the second report, or otherwise known, they must be resolved before a permit may be issued. We added the provision requiring the final compliance history report to be obtained after the applicant complies with the information update and certification requirement of final § 778.9(d) to ensure that the regulatory authority's permitting decision is based on the most current information.

F. Section 773.16—Permit Eligibility Determination

The provisions that we proposed at § 773.16 are found at §§ 773.12 and 773.14 of this final rule.

Under proposed § 773.16, permit eligibility determinations would be based upon the permit and compliance history of the applicant, operations which the applicant currently owns or controls, and operations the applicant owned or controlled in the past. If you were eligible for a permit, proposed § 773.16(a)(1) would have required us to determine whether additional permit conditions should be imposed under § 773.18. Proposed § 773.16(a)(2) required written notice of a finding of ineligibility. That notice also would have contained guidance as to how to challenge a finding on the ability to control the surface coal mining operation. Proposed § 773.16(b) provided for a ''presumption of NOV abatement'' and set forth criteria for the presumption.

In developing this final rule, we modified the proposed rule based upon the *NMA* v. *DOI II* decision concerning our previous rules and the comments we received on proposed §§ 773.15 and 773.16. (Section VI.E of this preamble contains a detailed discussion of the court decision.) We did not adopt the proposed provisions pertaining to additional permit conditions. We adopted proposed § 773.16(a) in modified form as final § 773.12. We also adopted proposed §§ 773.15(b)(3)(i)(B) and (C) and 773.16(b) in modified form as final § 773.14 (provisionally issued permits).

Final § 773.12—Permit Eligibility Determination

We added § 773.12 to this final rule as a part of the reorganization of part 773. Final § 773.12 contains a modified form of provisions proposed as §§ 773.15(b)(3) and 773.16(a).

Paragraphs (a) and (b). Paragraphs (a) and (b) of final § 773.12 require that the regulatory authority determine whether the applicant is eligible for a permit under section 510(c) of the Act, based upon a review of compliance, permit history, and ownership and control information under 30 CFR 773.9 through 773.11. Specifically, paragraph (a) states that—

Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit

if we find that any surface coal mining operation that—

(1) You directly own or control has an unabated or uncorrected violation;

(2) You or your operator indirectly own or control, regardless of when the ownership or control began, has an unabated or uncorrected violation cited on or after November 2, 1988; or

(3) You or your operator indirectly own or control has an unabated or uncorrected violation, regardless of the date the violation was cited, and your ownership or control was established on or after November 2, 1988.

The November 2, 1988 cutoff date in paragraphs (a)(2) and (3) reflects the decision in *NMA* v. *DOI II*, which prohibited us from applying the permit block sanction for actions that occurred before the effective date of our first ownership and control rules. In final paragraph (b), we clarify that the ban on retroactive application does not apply to situations in which there was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit at the time that the applicant or operator assumed indirect ownership or control or at the time the violation was cited, whichever is earlier.

Except for the addition of paragraph (b) and the November 2, 1988 cutoff date, final § 773.12(a) and (b) do not differ significantly in substance from the corresponding provisions in § 773.15(b)(1) of our previous rule.

Paragraph (c). Paragraph (c) of final § 773.12 provides that the regulatory authority may not issue a permit to an applicant if the applicant or operator is permanently ineligible to receive a permit under § 774.11(c). This provision is discussed more fully in sections VI.E. and K. of this preamble.

Paragraph (d). Paragraph (d) of final § 773.12 requires that, after approving the application, the regulatory authority refrain from issuing the permit until the applicant complies with the information update and certification requirement of 30 CFR 778.9(d). Paragraph (d) also requires that, after that update, but no more than five business days before permit issuance, the regulatory authority again request a compliance history report from AVS to ensure that the applicant remains eligible for a permit. Except for the addition of the 5-day timeframe, this paragraph is substantively identical to previous § 773.15(e). We added the 5-day limitation to ensure that the final compliance review occurs reasonably close to the date of permit issuance.

Paragraph (e). Paragraph (e) of final § 773.12 requires that the regulatory authority send the applicant written notice of any decision finding the applicant ineligible for a permit. Paragraph (e) further provides that the notice must contain the reason for the ineligibility determination and apprise the applicant of his or her appeal rights under 30 CFR part 775 and 43 CFR 4.1360 through 4.1369. We are adding these provisions to ensure that any adversely affected applicant is aware of the decision, the reasons for the decision, and the steps that must be taken to procure administrative review of the decision.

Disposition of comments pertaining to the permit eligibility criteria of proposed § 773.16(a). A commenter said that reference to owners and controllers of the applicant in proposed § 773.16(a)(1) should be deleted. In the permit eligibility criteria at § 773.12 of this final rule, we are not adopting the proposed reference to ''owners and controllers of the applicant.'' Likewise, we are not adopting the imposition of additional permit conditions based on the compliance history of an applicant's owners and controllers. As previously explained, at final § 773.12, we limit the permit eligibility review to an examination of whether the applicant and the operator have any outstanding violations or own or control any operations with outstanding violations.

A commenter said that proposed paragraph (a) fails to clearly provide that a permit block under section 510(c) can only occur on the basis of outstanding violations at operations the applicant presently owns or controls. As previously explained, we modified the proposal to conform it to the decision in *NMA* v. *DOI II*; in the process, we eliminated the commenter's concern. During the section 510(c) compliance review, we may only consider violations at operations which the applicant or operator presently owns or controls.

A commenter asserted that a parent company which owns or controls a subsidiary does not necessarily own or control the operations of the subsidiary. The commenter said that actual control of the operations is the only circumstance in a parent/subsidiary relationship that should lead to permit ineligibility for the parent company if the subsidiary has an outstanding violation.

We disagree. This argument was advanced and rejected in *NMA* v. *DOI II*. If the parent company owns or controls the subsidiary under the definitions we adopt today, the parent company, de facto, also owns or controls the subsidiary's operations. In upholding our previous construction of section 510(c), which, on this point, we import into this final rule, the D.C. Circuit explained that our view is ''consistent with, if not mandated by, the statutory language which, as noted, applies to any violating operations 'controlled by the applicant,' not only those directly owned by him. Accordingly, the agency's construction must be upheld.'' *NMA* v. *DOI II*, 177 F.3d at 5. Thus, in § 773.12 of this final rule, we retained the ability to deny permits based on both direct and indirect ownership or control (including both the exercise of control and the ability to control) of operations with current violations, subject to the court's retroactivity holding. *See also* our response to similar comments in sections VI.A. and E. of this preamble.

A commenter said that we correctly state that the appeals court [in *NMA* v. *DOI I*] found only one aspect of our rules to be flawed. However, the commenter also said that we should not alter other aspects of ''a permit block system which has been substantially successful in holding corporations accountable for the damage caused by their contract miners, but instead [should focus] on assuring that the full gamut of regulatory powers are employed to prevent those who have violated State or Federal environmental laws or this Act from obtaining new permits through indirect means.''

As discussed throughout this preamble, we believe that there are sound reasons for the assorted modifications that we are making to the rules implementing the permit block sanction of section 510(c) of the Act. We targeted our outreach efforts to identifying how our rules could be improved in their entirety, not just how our rules should be revised as a result of *NMA* v. *DOI I*. One of the new rules that we are adopting (part 847) emphasizes use of the alternative enforcement mechanisms provided in sections 518(e), 518(g), and 521(c) of the Act. See section VI.AA. of this preamble.

Several commenters said that OSM apparently believes ownership is irrelevant to permit eligibility determinations, and that eligibility is based only on ownership to the extent it reflects the ability to control. One commenter further said that ''[o]wnership itself should be a basis for [a permit eligibility determination], otherwise it insulates individuals that own but purposefully do not control.''

We agree that ownership in and of itself can form the basis for denying a permit. However, we note that both the proposal (see, e.g., proposed §§ 773.15(b)(3) and 773.16(a)) and final § 773.12 properly identify ownership and control as independent bases for permit denials under section 510(c). Thus, under this final rule, if an

applicant owns an operation with a violation, under the definition of ''*own, owner*, or *ownership*'' in final § 701.5, he or she will not be eligible for a permit unless he or she qualifies for a provisionally issued permit under final § 773.14). Further, under the challenge procedures we adopt today at final §§ 773.25 through 773.27, an applicant may only successfully challenge a listing or finding that he owns an operation by proving by a preponderance of the evidence that he does not own, or did not own, the relevant operation; in this situation, a demonstration of the lack of control of an operation will be of no avail.

Several commenters said that ''OSM should clarify the proper forum and procedures to challenge erroneous permit blocks. The permit applicant should not be punished for improper actions or inactions of regulatory bodies.'' We respond to this comment, and similar comments, in section VI.N., *infra*.

We invited comments on the criteria to identify which applicants should be subject to additional permit conditions and what types of conditions should be imposed. 63 FR 70580, 70595. Commenters did not provide comments in the context of proposed § 773.16. Commenters did, however, provide comments in response to this invitation with respect to proposed §§ 773.15 and 773.18. We address those comments in section VI.E. of this preamble.

Final § 773.14—Provisionally Issued Permits

We added § 773.14 to this final rule as part of the reorganization of part 773. Final § 773.14 is a modification of provisions in previous § 773.15(b)(1) and (2), proposed §§ 773.15(b)(3)(i)(B) and (C), and proposed § 773.16(b). Instead of using the term ''conditionally issued permits'' as in the previous and proposed rules, the final rule substitutes the term ''provisionally issued permits'' to clarify that permits issued under final § 773.14 are not the same as permits issued with conditions under 30 CFR 773.17.

Paragraph (a). Paragraph (a) of final § 773.14 explains that this section applies to applicants who own or control a surface coal mining and reclamation operation with either—

(1) A notice of violation issued under § 843.12 or the State regulatory program equivalent for which the abatement period has not yet expired; or

(2) A violation that remains unabated or uncorrected beyond the abatement or correction period.

Paragraph (b). Paragraph (b) of final § 773.14 identifies the circumstances under which a regulatory authority may find an applicant eligible for a permit even though an outstanding violation would otherwise make the applicant ineligible for a permit under 30 CFR 773.12 and section 510(c) of the Act. Specifically, final paragraph (b) states that—

> We, the regulatory authority, may find you eligible for a provisionally issued permit if you demonstrate that one or more of the following circumstances exists with respect to all violations listed in paragraph (a) of this section—
>
> (1) For violations meeting the criteria of paragraph (a)(1) of this section, you certify that the violation is being abated to the satisfaction of the regulatory authority with jurisdiction over the violation, and we have no evidence to the contrary.
>
> (2) As applicable, you, your operator, and operations that you or your operator own or control are in compliance with the terms of any abatement plan (or, for delinquent fees or penalties, a payment schedule) approved by the agency with jurisdiction over the violation.
>
> (3) You are pursuing a good faith—
>
> (i) Challenge to all pertinent ownership or control listings or findings under §§ 773.25 through 773.27 of this part; or
>
> (ii) Administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the listing or finding and that decision remains in force.
>
> (4) The violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation, unless there is an initial judicial decision affirming the violation and that decision remains in force.

In general, final § 773.14(b) is substantively identical to the corresponding provisions in §§ 773.15(b)(1) and (2). However, there is one significant exception. We added paragraph (b)(3) to the final rule in response to comments that our challenge procedures for ownership and control listings or findings failed to provide due process by way of a pre-deprivation hearing. To address these concerns, and in the interest of equity, the final rule allows issuance of a provisional permit when a person is in the process of challenging an ownership or control listing or finding. Our rules have always included a similar provision for good faith administrative and judicial appeals of the validity of a violation. We see no reason not to extend this opportunity to persons who are pursuing good faith challenges to, or administrative or judicial review of, ownership or control listings or findings.

This paragraph of the final rule will afford additional due process protection to adversely affected applicants while presenting little risk of environmental harm. The applicant must meet all other permit application approval and issuance requirements before receiving a provisionally issued permit. In addition, the provisional permittee must comply with all performance standards. If he or she fails to do so while pursuing a challenge or appeal of all pertinent ownership or control listings and findings, the regulatory authority must take all appropriate enforcement measures, including issuance of an imminent harm cessation order when applicable.

Furthermore, addition of this provision does not abrogate the permit eligibility provisions of section 510(c) of the Act. It merely delays their implementation until a judicial decision affirms the validity of a violation or an ownership or control listing or finding. An applicant whose challenges and appeals are ultimately unsuccessful will be ineligible to receive a permit from that time forward until the violation causing the ineligibility is corrected or until the applicant ceases to be responsible for that violation.

Paragraph (c). Paragraph (c) of final § 773.14 provides that the regulatory authority must immediately initiate procedures under §§ 773.22 and 773.23 to suspend or rescind a provisionally issued permit if—

(1) Violations included in final § 773.14(b)(1) are not abated within the specified abatement period;

(2) The applicant, operator, or operations that the applicant or operator owns or controls do not comply with the terms of an abatement plan or payment schedule mentioned in final § 773.14(b)(2);

(3) In the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in final § 773.14(b)(3) or (4) affirms the validity of the violation or the ownership or control listing or finding; or

(4) The initial judicial review decision referenced in final § 773.14(b)(3)(ii) or (4) affirms the validity of the violation or the ownership or control listing or finding.

We added this new paragraph to ensure that regulatory authorities take action to suspend or rescind provisionally issued permits as improvidently issued when the conditions justifying provisional issuance cease to exist. As this rule makes clear, a provisional permittee is not entitled to, nor is there any need for, the initial review and finding requirements of § 773.21 normally applicable to improvidently issued permit proceedings. The initial permit

application review procedures leading to issuance of a provisional permit effectively replace the initial review and finding requirements of § 773.21. Therefore, the final rule requires that the regulatory authority proceed directly to § 773.22 and propose to suspend or revoke the permit.

Under the previous rule at § 773.15(b)(1)(ii), the permittee had 30 days from the date that the initial judicial review decision affirmed the validity of the violation to submit proof that the violation was being corrected to the satisfaction of the agency with jurisdiction over the violation. In contrast, final § 773.14(c) requires that the regulatory authority initiate action to suspend or revoke the permit as improvidently issued if the disposition of challenges or administrative or judicial appeals affirms the violation or ownership or control listing or finding. We made this change to ensure prompt implementation of the section 510(c) permit block sanction once the validity of a violation or ownership or control listing or finding is affirmed on appeal. (The previous rule did not specify what action the regulatory authority must take if the permittee did not submit the required proof within 30 days.) Under § 773.23 of the final rule, the permittee still has ample opportunity to submit proof of corrective action and thus avoid permit suspension or revocation. Final § 773.22(b) requires 60 days notice for a proposed suspension, while final § 773.22(c) requires 120 days notice for a proposed rescission.

Disposition of Comments on Presumption of NOV Abatement

In the proposed rule, we provided that the presumption that a notice of violation (NOV) is being corrected—the ''presumption of NOV abatement''—was not available to applicants who were subject to additional permit conditions under proposed § 773.18 because their owners or controllers were linked to violations. We invited comments on withholding the presumption of NOV abatement based on this criterion, and also sought suggestions as to other criteria which could be used to withhold the benefit of the presumption. 63 FR 70580, 70593. In this final rule, we are not adopting the ''additional permit conditions'' of proposed § 773.18. We also decided not to distinguish between applicants who can and cannot obtain the benefit of the presumption of NOV abatement. Rather, all applicants may obtain the benefit of the presumption, provided that they meet the requirements of final § 773.14.

Several commenters argued that the presumption of NOV abatement is unlawful because it is inconsistent with section 510(c) of SMCRA. The commenters said the law requires submission of proof that an NOV is being corrected to the satisfaction of the regulatory authority or agency with jurisdiction over the violation and that there is no discretion on this point.

We disagree with these commenters. The provisionally issued permit provisions that we adopt at § 773.14 today continue, in substance, our previous use of the presumption and are a reasonable implementation of section 510(c). We extensively explained the basis for the presumption in the preamble to our 1994 AVS Procedures rule. 59 FR 54306, 54322–54324 (October 28, 1994). We continue to rely, in part, on the same rationale for purposes of this rulemaking. In short, based on our experience, we firmly believe that the efficiencies gained by use of the presumption far outweigh any perceived reduction in environmental harm that might result from its elimination.

Further, we note that the certification requirement in final § 773.14(b)(1) satisfies section 510(c)'s proof requirement that an applicant who owns or controls operations that are currently in violation submit ''proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation * * *.'' An applicant's certification that the violation is in fact being abated, with attendant consequences for failure to comply with the certification, constitutes adequate proof under section 510(c). To that extent, the use of the term ''presumption'' in connection with this provision is a misnomer; under this final rule, regulatory authorities cannot simply ''presume'' that an NOV is being abated, but must require the requisite certification before a permit may be provisionally issued.

In NMA's challenge to the AVS Procedures rule, the U.S. District Court for the District of Columbia stated: ''The Court finds the ''certification of abatement'' requirement consistent with SMCRA and a rational way to enforce the Act's requirements.'' *National Mining Assoc.* v. *Babbitt*, 43 Env't Rep. Cas. (BNA) 1097, 1109 (D.D.C. 1996), *appeal docketed*, No. 96–5274 (D.C. Cir). As the court explained, ''certification provides state-of-mind insurance to the regulatory authority by giving it recourse against the applicant who does not correct a NOV.'' *Id.* at 1110. Similar recourse is available in final § 773.14(c).

When there is an unabated or uncorrected violation and the abatement or correction period has expired, final § 773.14(b)(2) establishes prerequisites for provisional permit issuance that similarly satisfy the proof requirement. The presence of an approved abatement plan or payment schedule, and confirmation of compliance with the plan or schedule, represents a good faith effort to correct the violation and constitutes more than adequate proof that the violation is being abated. Finally, the criteria §§ 773.14(b)(3) and (4), which allow issuance of a provisional permit when the violation or ownership or control listing or finding is the subject of a good faith challenge or administrative or judicial appeal, have adequate support in the legislative history of section 510(c), as discussed at 44 FR 15024–25 (March 13, 1979).

The National Wildlife Federation and Kentucky Resources Council, Inc. also filed a complaint challenging our 1994 AVS procedures rule. In that action, plaintiffs claimed, among other things, that the presumption of NOV abatement failed to satisfy section 510(c)'s proof requirement. Ultimately, the parties filed a joint motion for voluntary dismissal of the action, based on our agreement to ''reopen the issues and regulatory language complained of in this lawsuit for public comment, and to reevaluate the position of the agency with respect to those matters complained of in this case,'' including the presumption of NOV abatement. By order of September 15, 1997, the court granted the joint motion. This rulemaking, in conjunction with our 1998 proposed rule, fulfils the commitment we made in the joint motion. We carefully considered all the comments received on our proposal to continue the use of the presumption of NOV abatement. As explained above, we decided to retain the presumption, confident that it is consistent with section 510(c) of the Act. However, we revised the previous rules by providing that we will immediately propose to suspend or revoke a provisionally issued permit under final §§ 773.22 and 773.23 if a person fails to comply with its terms. *See* final § 773.14(c). This change should increase the probability that a notice of violation will be abated.

Three commenters expressed concern over the resources required to monitor the notices of violation issued to permittees with less than five years experience in surface coal mining operations. As explained elsewhere in this preamble, we are not adopting the experience criterion. Therefore, no additional resources will be required to

monitor NOVs issued to permittees with less than five years of experience.

One commenter said that proposed § 773.16(b) would eliminate the presumption of NOV abatement. Final § 773.14 clearly provides that the presumption of NOV abatement is still available.

A commenter said:

> An outstanding violation is to be defined as one where the abatement period has expired without corrective action. A portion of the presumption [of NOV abatement] includes an abatement period which has not expired. It is unclear how a regulatory authority can presume the abatement period has not expired when the presumption process is triggered by a violation for which the abatement period has already expired.

The commenter is incorrect that the proposed presumption of NOV abatement is ''triggered by a violation for which the abatement period has already expired.'' Proposed § 773.16(b)(1)(ii) clearly said, ''we may presume an NOV is being corrected to the satisfaction of the agency with jurisdiction over the violation if the abatement period for the notice of violation has not yet expired.'' 63 FR 70580, 70619. Indeed, the primary basis for use of the provision is that the abatement period has *not* expired. *See* proposed § 773.16(b)(1)(ii) and final § 773.14(b)(1). However, we note that final § 773.14(b) also pertains to violations which remain unabated or uncorrected beyond the abatement or correction period. To receive a provisionally issued permit when there is such a violation, a person must be eligible under § 773.14(b)(2) through (4).

A commenter said that if there is no failure-to-abate cessation order, then the abatement period for an NOV has not expired. We disagree. The fact that a failure-to-abate cessation order has not been issued does *not* mean that the abatement period has not expired.

Three commenters expressed support for the presumption of NOV abatement. One said the presumption ''is clearly supported by the Act. Section 521(a)(3) expressly sets forth that the NOV will provide 'a reasonable time' for the abatement of the violation.'' We agree that the presumption is supported by section 510(c) of the Act, but not by section 521(a)(3). Providing a reasonable time for abatement does not mean that the NOV is not a violation when written; nor is it the same thing as presuming a violation is being abated within the time period allotted for abatement. We retained the presumption because it is beneficial to State regulatory authorities and industry, will not likely result in harm to the environment, and because it is authorized by section 510(c) of the Act.

Two commenters said the presumption of NOV abatement ''supports the concept of all violations being entered into AVS, then updated as to [whether they are] abated or not.'' The commenters questioned the need for the States to perform, as they see it, duplicate data entry. They said, ''[we] really do not think our State is going to deny a permit because the applicant may owe a penalty in another State. This situation would be overridden under today's AVS recommendation.''

These commenters are mistaken. First, they are incorrect as to the effect of the presumption on violation data in AVS. Use of the NOV presumption is continued from previous regulations. It has not meant, nor does it now mean, that all notices of violation must be entered into AVS. Rather, under final §§ 773.8(b)(2) , 773.8(c), and 774.11(a)(2), regulatory authorities must enter into AVS only those violations which are unabated or uncorrected after the abatement or correction period has expired. Second, the commenters are incorrect regarding the effect ''a penalty in another State'' has on permit eligibility. Unless a person is eligible under final §§ 773.13 or 773.14, final § 773.12 and section 510(c) do not allow issuance of a permit if the applicant owns or controls an operation with a current violation; that violation may be anywhere in the United States. AVS helps to implement this statutory requirement. The recommendation process we previously used would not result in the outcome alleged by these commenters.

Finally, a commenter said that proposed § 773.16(b)(2)(iv) must be deleted because we may not issue a notice of violation for non-payment of abandoned mine land fees or civil penalties. We are not adopting proposed § 773.16(b)(2)(iv). Under this final rule, the presumption of NOV abatement is available for all NOVs, including those written for non-payment of reclamation fees. Under 30 CFR 773.17(g), every permit must contain a condition requiring payment of reclamation fees. Failure to adhere to this permit condition is enforceable under 30 CFR 843.12, which authorizes issuance of an NOV for noncompliance with a permit condition.

G. Section 773.17—Permit Conditions

In this final rule, the provisions we adopt from proposed § 773.17 are found at §§ 774.11 and 774.12.

Proposed § 773.17(h)

We proposed to revise existing § 773.17(h), which requires permittees to provide or update ownership and control information, or indicate that there is no change in the information, within 30 days of receiving a cessation order issued under § 843.11. The proposed rule would have revised the cross-references in § 773.17(h) to be consistent with the proposed revisions to the application information requirements in proposed § 778.13 and to clarify that the updated application information should be based upon the information provided to the regulatory authority in a permit application. We received no comments on proposed § 773.17(h).

As part of our reorganization of part 773, we are recodifying the provisions in previous and proposed § 773.17(h) in revised form at final § 774.12(a). Section VI.P. of this preamble discusses final § 774.12(a) more fully in the context of proposed § 774.13(e).

Proposed § 773.17(i)

This new paragraph would have provided that the regulatory authority would assume that the permittee, the operator, and any other person named in the application as having the ability to determine the manner in which a surface coal mining operation is conducted is a controller. We are not adopting this provision because final § 778.11 already requires disclosure of applicant, operator, and ownership and control information. Therefore, proposed § 773.17(i) is unnecessary.

Proposed § 773.17(j)

We proposed to add paragraph (j) to § 773.17 to state that all controllers are jointly and severally responsible for compliance with the terms and conditions of the permit and are subject to the jurisdiction of the Secretary of the Interior. Several commenters opposed proposed § 773.17(j) as lacking sufficient basis in SMCRA. After further evaluation, we agree. Therefore, we are not adopting proposed § 773.17(j).

Proposed § 773.17(k)

We proposed to add paragraph (k) to § 773.17 to allow the regulatory authority to identify, at any time, any controller that the permittee did not previously identify to the regulatory authority. We are not adopting proposed § 773.17(k) as a permit condition, but we are adopting it in revised form as a stand-alone provision at final § 774.11(f). Under that final rule, the regulatory authority may identify any owner or controller of an applicant or operator not disclosed in a permit

application. Section VI.K. of this preamble more fully discusses final § 774.11(f) in the context of proposed § 773.22.

Some commenters opposed proposed § 773.17(k) as an unusual determination that sounded like a presumption, did not provide an opportunity to challenge a finding of control, and did not obligate the regulatory authority to provide any explanation of the basis for the determination.

The proposed rule did not involve a presumption. However, in response to the commenters' concerns, we added a requirement in final § 774.11(f) that the regulatory authority make a written finding explaining the basis for the determination. We also added language specifying that a person has the right to challenge the finding under final §§ 773.25 through 773.27. We discuss final § 774.11 more fully in section VI.K. of this preamble in the context of proposed § 773.22.

Proposed § 773.17(l)

We proposed to add paragraph (l) to § 773.17 to require permittees and operators to abate or correct any outstanding violation or payment, unless an administrative or judicial decision invalidates the violation. There were no comments on this proposal. However, we are not adopting the proposed rule because part 843 of our existing rules already requires abatement and correction of violations.

Proposed § 773.17(m)

We proposed to add paragraph (m) to § 773.17 to state that a permit is subject to any other special permit conditions that the regulatory authority determines to be necessary to ensure compliance with the performance standards and regulations. Commenters opposed this proposed rule as unnecessary. We agree that regulatory authorities already have the inherent authority to impose any necessary conditions when issuing a permit. Therefore, we are not adopting proposed § 773.17(m).

H. Section 773.18—Additional Permit Conditions

In this final rule, we are not adopting any of the provisions proposed at § 773.18.

We proposed to add § 773.18 to our regulations to provide for the imposition of additional permit conditions on new permits if the applicant has less than five years experience in surface coal mining operations or if the applicant's controllers have not demonstrated successful environmental compliance. We are not adopting proposed § 773.18 because we found insufficient basis under SMCRA for treating these applicants in a manner that differs from the treatment afforded to other applicants.

I. Section 773.20—Improvidently Issued Permits: General Procedures

In this final rule, the provisions proposed at §§ 773.20 and 773.21 are found at §§ 773.21 through 773.23. In this section of the preamble, we discuss the proposed and final provisions collectively, and do not repeat the discussion in section VI.J. of this preamble. In section VI.J., we will only discuss the comments received on proposed § 773.21.

In 1989, we promulgated regulations to establish procedures and criteria relating to improvidently issued permits. 54 FR 18438 (April 28, 1989). In *NMA* v. *DOI I,* which was decided in 1997, the D.C. Circuit invalidated the 1989 rule on the narrow grounds that it was centered on the invalidated 1988 ownership or control rule. 105 F.3d at 692, 696. Prior to that ruling, we revised the procedures in 1994. 59 FR 54325 (October 28, 1994). The 1994 rule provisions were upheld in their entirety, though the case is currently on appeal to the D.C. Circuit. *National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. (BNA) 1097, 1111–17 (D.D.C. 1996), *appeal docketed,* No. 96–5274 (D.C. Cir). In our 1997 emergency interim final rule (IFR), which was issued after the *NMA* v. *DOI I* decision, we cured the defects noted by the court of appeals and repromulgated otherwise substantively identical improvidently issued permits provisions. 62 FR 19450, 19453 (April 21, 1997); previous 30 CFR 773.20 and 773.21.

In our December 21, 1998 proposal, we reproposed previous §§ 773.20 and 773.21 in their entirety, with only minor proposed revisions. 63 FR 70597–98; 70620. The proposed revisions included:

- Adding failure to provide information which would have made the applicant ineligible for a permit to the criteria we use to determine if a permit was improvidently issued (see proposed § 773.20(b)(1)(iii); *see also* related provisions at proposed §§ 773.20(c)(1)(i), 773.20(c)(1)(ii)(C), 773.21(a)(2), 773.21(a)(5)). As discussed below, we did not adopt these revisions.
- Removing previous § 773.20(c)(1)(ii), which included imposition of a permit condition requiring abatement or correction of a violation as one of the remedial measures a regulatory authority could take relative to an improvidently issued permit. As discussed below, we deleted this provision as proposed.
- Removing previous § 773.20(b)(2), which made the challenge standards at previous § 773.25 applicable to certain improvidently issued permit proceedings. As discussed below, we did not adopt this revision.

After the close of the comment period for the proposed rule, the D.C. Circuit issued its decision relating to the National Mining Associations's challenge to the IFR. *NMA* v. *DOI II,* 177 F.3d 1 (D.C. Cir. 1999). The court of appeals upheld the improvidently issued permits provisions contained in the IFR, stating as follows:

> [T]he IFR rescission and suspension provisions reflect a permissible exercise of OSM's statutory duty, pursuant to section 201(c)(1) of SMCRA, to ''order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this chapter or any rules and regulations adopted pursuant thereto.'' 30 U.S.C. 1211(c). The IIP provisions simply implement the Congress's general directive to authorize suspension and rescission of a permit ''for failure to comply with'' a specific provision of SMCRA—namely, section 510(c)'s permit eligibility condition.

Id. at 9. The court also explained: ''In addition, apart from the express authorization in section [201(c)(1)], OSM retains ''implied'' authority to suspend or rescind improvidently issued permits because of its express authority to deny permits in the first instance.'' *Id.* (citation omitted).

In this final rule, we adopt the basic approach and substance of the provisions upheld by the court. To the extent the provisions we adopt today correspond to our previous provisions, we continue to rely upon the rationales set forth in the preambles to the prior rulemakings. *See* 54 FR 18439–62; 59 FR 54325–29; 62 FR 19453. However, based on comments, the *NMA* v. *DOI II* decision, and further deliberation, we modified the proposal. The most significant modifications from our previous regulations and the proposed rule are enhanced due process and public notice provisions. We also applied plain language principles, reorganized proposed §§ 773.20 and 773.21 into three sections, and eliminated duplicate text. A discussion of the proposed and final provisions follows.

Discussion of Proposed Revisions to Previous §§ 773.20 and 773.21

Proposed §§ 773.20(b)(1)(iii), 773.20(c)(1)(i), 773.20(c)(1)(ii)(C), 773.21(a)(2), and 773.21(a)(5)

As mentioned above, we proposed adding failure to provide information which would have made the applicant ineligible for a permit to the criteria we

use to determine if a permit was improvidently issued. *See* proposed § 773.20(b)(1)(iii). If we found a permit improvidently issued on this basis, we could require the permittee to correct any inaccurate information or provide any incomplete information. *See* proposed § 773.20(c)(1)(i). Under proposed § 773.20(c)(1)(ii)(C), we could suspend the permit until the inaccurate or incomplete information was corrected or provided. Under proposed §§ 773.21(a)(2) and (a)(5), we would not suspend or rescind a permit if the inaccurate or incomplete information was provided or subject to a pending challenge.

We did not adopt these proposed revisions. Under the proposed rule, we intended to allow failure to submit accurate and complete information at the time of application for a permit to form the basis for a finding that a permit was improvidently issued, if disclosure of the information would have made the applicant ineligible to receive a permit.

However, upon further review, we determined that we did not have a sufficient basis to in effect treat failure to supply permit application information as a violation in the absence of any underlying outstanding enforcement action concerning the failure to submit that information. It is an underlying violation, and not a failure to disclose information, which is the ultimate basis for a finding that a permit was improvidently issued.

Proposed Withdrawal of Previous § 773.20(c)(1)(ii)

We proposed to remove previous § 773.20(c)(1)(ii), which included imposition of a permit condition requiring abatement or correction of a violation as one of the remedial measures a regulatory authority could take relative to an improvidently issued permit. We deleted this provision as proposed. We concluded it is unnecessary to impose a permit condition to achieve abatement or correction under these provisions. Because this final rule provides ample incentive and opportunity for abatement, coupled with appropriate sanctions if a violation is not abated, adding a permit condition is not necessary.

Proposed Withdrawal of Previous § 773.20(b)(2)

We proposed to withdraw previous § 773.20(b)(2), which made the challenge standards of previous § 773.25 applicable to certain improvidently issued permit proceedings. As discussed below, we did not fully adopt the proposed withdrawal. In final § 773.21(e), we provide that the ownership or control challenge procedures at final §§ 773.25 through 773.27 apply when a person is challenging an ownership or control finding which leads to a determination that a permit was improvidently issued.

Discussion of Final Rule Provisions

Final § 773.21—Initial review and finding requirements for improvidently issued permits.

Under final § 773.21(a), if a regulatory authority has reason to believe a permit was improvidently issued, it must review the circumstances surrounding permit issuance. Assessing the criteria at final §§ 773.21(a) and (b), which are similar to the criteria at previous § 773.20(b), the regulatory authority will make a preliminary finding if it determines that the permit was improvidently issued. The ''reason to believe standard'' is carried forward from previous § 773.20(a). Under this standard, the regulatory authority is not required to review all of the permits in its jurisdiction on a regular basis for improvident issuance. Rather, § 773.21 will apply if the regulatory has some particular reason to believe a permit was improvidently issued. The ''reason to believe'' standard would encompass credible evidence submitted by citizens which may indicate improvident issuance of a permit.

Section 773.21(b) provides that a permit will only be considered improvidently issued if the circumstances in paragraphs (b)(1) through (3) exist. These provisions are substantively identical to previous §§ 773.20(b)(1)(ii) and (iii) in that a permit will not be considered improvidently issued if the permittee is no longer ineligible for a permit. When a permittee severs its ownership or control relationship, abates or corrects the violation, or otherwise becomes eligible to receive a new permit, it is incongruous to suspend or rescind an existing permit only to issue a new one to the same permittee upon reapplication.

The concept of a ''preliminary finding,'' as provided for in final § 773.21(a), is new in this rulemaking. Under final § 773.21(c), if the regulatory authority makes a preliminary finding of improvident issuance, it will serve the permittee with written notice of the finding and provide public notice of the decision. Then, under final § 773.21(d), the permittee may challenge the preliminary finding by submitting evidence, within 30 days of receiving the notice, that the permit was not improvidently issued. Together, these provisions enhance due process and public notice.

Final § 773.21(e) provides that the ownership or control challenge procedures at final §§ 773.25 through 773.27 apply when a challenge to a preliminary finding of improvident issuance involves issues of ownership or control. This provision is modified from previous § 773.20(b)(2). While we proposed to withdraw previous § 773.20(b)(2), we decided that it is important to have uniform challenge procedures for issues of ownership or control. Thus, at final § 773.21(e), we retained the substance of previous § 773.20(b)(2)(ii), in modified form. However, as explained in detail in section VI.M. of this preamble, a person may not use the provisions at §§ 773.25 through 773.27 to challenge the initial existence or status of a violation. Only the regulatory authority, or other agency, with jurisdiction over a violation may resolve issues pertaining to the initial existence or status of a violation. However, under final § 773.21(d), a person may submit evidence that the violation has been abated, or is being abated, to the satisfaction of the regulatory authority, or other agency, with jurisdiction over the violation. Likewise, if the initial existence of a violation has been timely challenged, and the challenger prevailed, evidence of the outcome may be submitted under final § 773.21(d).

Final § 773.22—Notice Requirements for Improvidently Issued Permits.

Final § 773.22(a) provides that the regulatory authority will serve a written notice of proposed suspension or rescission on the permittee if: (1) the regulatory authority, after considering any evidence submitted under final § 773.21(d), finds that the permit was improvidently issued or (2) the permit was provisionally issued under final § 773.14(b) and one or more of the conditions in §§ 773.14(c)(1) through (4) exists. This finding differs from the preliminary finding under final § 773.21 in that the permittee will have been given a prior opportunity under final § 773.21(d) to submit evidence that the permit was not improvidently issued. This finding also triggers the notice requirements of final §§ 773.22(b) and (c) and requires the regulatory authority to take action under final § 773.23 (*see* final § 773.22(f)). If, after making a finding that the permit was improvidently issued, the regulatory authority decides to suspend the permit, it must provide the permittee with 60 days notice; if the regulatory authority decides to rescind the permit, it must provide the permittee with 120 days

notice. The provisions of final §§ 773.22(a) through (c) derive from previous § 773.20(c)(2) and the introductory language of previous § 773.21. In order to enhance public notice, we added final § 773.22(d), which requires public posting of the notice of proposed suspension or rescission.

Final § 773.22(e) is derived from previous § 773.20(c)(2). It allows the permittee to request administrative review of a notice of proposed suspension or rescission with the Department of the Interior's Office of Hearings and Appeals (OHA), or its State counterpart, before a permit is suspended or rescinded under final § 773.23. Final paragraph (e) also specifies that a permittee who wishes to appeal a notice must exhaust available administrative remedies. Final § 773.22(f) clarifies that after the permittee is served with a notice of proposed suspension or rescission, the regulatory authority must take action under final § 773.23. Final § 773.22(g) governs service of the notice, and final § 773.22(h) provides that the time periods specified in paragraphs (b) and (c) will remain in effect during the pendency of any appeal, unless the permittee obtains temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent. While the time periods are not tolled during the pendency of an appeal, under final § 773.23(b), we will not suspend or rescind a permit until there is a final disposition of any administrative appeals which affirms our finding that the permit was improvidently issued.

Final § 773.23—Suspension or Rescission Requirements for Improvidently Issued Permits.

Final § 773.23(a) largely corresponds to previous § 773.21(a). Under final § 773.23(a), subject to the exception in final § 773.23(b), the regulatory authority will suspend or rescind the permit upon expiration of the time specified in final § 773.22(b) or (c), unless the permittee submits evidence, and the regulatory authority finds, that suspension or rescission is no longer warranted under the circumstances enumerated in final §§ 773.23(a)(1) through (6). Paragraphs (a)(1) through (6) are substantively identical to previous §§ 773.21(a)(1) through (4), except that we have modified some of the language and terminology for consistency with plain language principles and other provisions of this final rule. We added paragraph (a)(6) and modified paragraph (a)(4) for consistency with the new eligibility standards for provisionally issued permits under final § 773.14(b). It is appropriate to forestall suspension or rescission under these circumstances because the permittee would no longer be ineligible to receive a permit under 30 CFR 773.12 or 773.14 and section 510(c) of the Act.

Under final § 773.23(b), if the permittee requests administrative review of a notice of proposed suspension or rescission under final § 773.22(e), we will not suspend or rescind the permit until there is a final administrative disposition which affirms our finding that the permit was improvidently issued. As discussed more fully below, we added this provision in response to comments raising due process concerns.

Final § 773.23(c)(1) is partially new, and partially derived from previous § 773.21(b). When a regulatory authority suspends or rescinds a permit, final § 773.23(c)(1) requires the regulatory authority to issue a written notice to the permittee, requiring the permittee to cease all surface coal mining operations under the permit. Final § 773.23(c)(2) requires the regulatory authority to publicly post the notice. Final § 773.23(d) allows the permittee to request, at its election, either administrative or judicial review of a permit suspension or rescission. The suspension or rescission will remain in effect during the pendency of any administrative or judicial appeals. We added final §§ 773.23(b) through (d) to enhance due process and public notice.

Responses to Comments on Proposed Section 773.20

A commenter said that once an abatement or payment plan is entered into, completion of the abatement or payment plan should become a permit condition. The commenter also said that the regulatory authority should stay the rescission of the permit only if an abatement plan is executed and the plan is imposed as a condition on the improvidently issued permit.

As mentioned above, the remedies for an improvidently issued permit will no longer include imposition of a permit condition requiring abatement of the violation. However, if we do not suspend or rescind an improvidently issued permit because the permittee enters into an abatement plan or payment schedule, we may suspend or rescind the permit under final § 773.23 if the abatement plan or payment schedule is not being met to the satisfaction of the agency with jurisdiction over the violation (unless one of the other criteria of § 773.23 precludes suspension or rescission). In the face of permit suspension or rescission, these final provisions provide ample incentive to permittees to cause violations to be abated or corrected. Permit conditions are unnecessary to achieve this result.

A commenter said that the public should be given explicit rights to request enforcement action against permits that have been improvidently issued and to appeal a decision by the regulatory authority not to take action.

As indicated above, these final provisions enhance the public's notice of decisions by the regulatory authority concerning improvidently issued permits. The final provisions require the regulatory authority to provide public notice at three specific decision points: (1) when the regulatory authority makes a preliminary finding that a permit was improvidently issued (*see* final § 773.21(c)(2)); (2) when the regulatory authority finds that a permit was improvidently issued and serves the permittee with a notice of proposed suspension or rescission (*see* final § 773.22(d)); and (3) when the regulatory authority suspends or rescinds a permit (*see* final § 773.23(c)(2)). Further, under the ''reason to believe'' standard under in final § 773.21(a), a regulatory authority will receive and consider information from concerned citizens pertaining to improvidently issued permits. Such information, if credible, may well inform a regulatory authority's decision as to whether a permit was improvidently issued. Finally, citizens can continue to assert their interests under the existing provisions at 30 CFR 842.11 and 842.12. The provisions we adopt today provide for ample public notice, and thereby expand the opportunity for public participation under our existing regulations.

The same commenter said that the proposed provisions create an essentially meaningless standard of review to determine if a permit was improvidently issued. According to the commenter, the scope of review to determine whether a permit was improvidently issued is limited to the ''violations review criteria'' of the regulatory program at the time of permit issuance. The commenter objected to ''OSM's deferral'' to State regulatory authorities to determine which types of violations would be ''the subject of the permit block for improvidently issued permits.'' The commenter also said that any violation of the Act should be the basis for determining if a permit has been improvidently issued.

We disagree with this characterization of the proposal, but note that we modified the proposed provision to which the commenter objects. In final

§ 773.21(a), we replaced the phrase ''violations review criteria'' at previous § 773.20. Under final § 773.21(a), a permit will be considered improvidently issued, if, among other things, the permit should not have been issued under the ''permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance'' because the permittee or operator owned or controlled a surface coal mining operation with an unabated or uncorrected violation. Under the final provision, the regulatory authority must consider all violations, as the term *violation* is defined in final § 701.5. Thus, regulatory authorities do not have discretion to determine which violations may be considered when making a determination whether a permit was improvidently issued.

A commenter expressed concern regarding proposed § 773.20(b)(1)(i). Under the proposed provision, a permit would be considered improvidently issued if there was an outstanding violation under the violations review criteria at the time the permit was issued. The commenter said the proposed provision seemed to conflict with proposed §§ 773.15(b)(3)(i)(B) and (C), which proposed to allow conditional approval of permits when applicants are linked to outstanding violations.

Under this final rule, a permit will only be found to be improvidently issued if, among other things, the permit should not have been issued under the permit eligibility criteria of the regulations implementing section 510(c) of the Act at the time of permit issuance. *See* final § 773.21(a). Under § 773.12(a) of this final rule, a person who owns or controls an operation with an outstanding violation may nonetheless be eligible for a permit under final § 773.13 or a provisionally issued permit under final § 773.14. Thus, if a person with outstanding violations was eligible for a permit under final §§ 773.13 or 773.14 at the time of permit issuance, a permit will not be considered to be improvidently issued at the time of issuance. However, under final §§ 773.14(c) and 773.22(a)(2), a provisionally issued permit will be considered improvidently issued, and we will initiate suspension or rescission procedures, if one or more of the circumstances in §§ 773.14(c)(1) through (4) exists.

Several commenters expressed concern about OSM oversight of State permitting decisions in the context of improvidently issued permits. Our oversight relative to improvidently issued State permits is governed, in part, by final § 843.21. Final § 843.21 is fully discussed in section VI.Y. of this preamble. In *NMA* v. *DOI II,* the court of appeals upheld our ability to suspend or revoke State-issued permits, but found that our previous regulations did not comply with the procedures established under section 521(a)(3) of SMCRA. *NMA* v. *DOI II,* 177 F.3d at 9. Final § 843.21 is fully consistent with the *NMA* v. *DOI II* decision.

A commenter said that the provisions should be revised so that the regulatory authority does not suspend or revoke a permit ''unless and until a plan for correcting the problem has been attempted but failed.'' Other commenters said that a permittee or operator should not be allowed to enter into an abatement plan to forestall a finding of improvident issuance or suspension or rescission of a permit. These commenters said allowing a permittee to forestall suspension or rescission by entering into an abatement plan encourages fraud at the permit application stage because the operator knows if he gets caught, he can later negotiate an abatement plan and mining can continue, without penalty.

Under final § 773.21, if the violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation, the permit will not be considered improvidently issued because the permittee would no longer be ineligible to receive a permit. *See* final § 773.21(b)(3). Further, under final § 773.23(a)(5), we will not suspend or rescind an improvidently issued permit if, after a finding of improvident issuance under final § 773.22(a), the violation becomes subject to an abatement plan or payment schedule. However, we may proceed to suspension or rescission if the abatement plan or payment schedule fails. The ultimate intent of these provisions is not to suspend or rescind permits, but to accomplish abatement of violations. However, a regulatory authority has no obligation to enter into an abatement plan or payment schedule, especially if it has reason to believe that a person will not comply with the plan or schedule. The discretion lies with the regulatory authority to determine whether the person is acting in good faith. We are confident that regulatory authorities will not encourage or reward fraudulent activity by entering into abatement plans with bad actors, but will instead proceed with suspension or rescission, and use any other enforcement tools available to compel compliance.

A commenter said our proposed improvidently issued permits provisions are ''not only unauthorized but are grossly inconsistent with the [Act].'' We received this comment before the decision in *NMA* v. *DOI II.* As explained above, the D.C. Circuit upheld our substantively similar previous rules, holding that they were expressly authorized by section 201(c)(1) of the Act. 177 F.3d at 9. ''Apart from the express authorization in section [201(c)(1)],'' the court explained, ''OSM retains 'implied' authority to suspend or rescind improvidently issued permits because of its express authority to deny permits in the first instance.'' *Id.* (citation omitted).

Finally, a commenter objected to our reference in proposed § 773.20(b)(3) to ''operations'' being responsible for violations. The commenter stated that an operation is not a legal entity and therefore cannot be responsible for violations. We have recast the final provisions from responsibility for violations to ownership or control of operations to eliminate confusion. Thus, under this final rule, a permit will only be considered improvidently issued if, among other things, the permittee or the operator continues to own or control the operation with an unabated or uncorrected violation and the violation would cause the permittee to be ineligible under the permit eligibility criteria in our current regulations. *See* final §§ 773.21(b)(1) and (b)(3). These provisions do not impose personal liability on owners or controllers of permittees or operators.

J. Section 773.21—Improvidently Issued Permits: Rescission Procedures

In this final rule, the provisions proposed at §§ 773.20 and 773.21 are found at §§ 773.21 through 773.23. In this section of the preamble, we discuss the comments received on proposed § 773.21. We discuss the proposed and final improvidently issued permits provisions, collectively, in section VI.I. of this preamble.

Several commenters asked for an explanation of proposed § 773.21(a)(4), which would provide that a permit would not be suspended or rescinded if the permittee and operations owned or controlled by the permittee are no longer responsible for the violation, penalty, or fee, or the obligation to provide required information. Three commenters asked how the permittee can be responsible for a violation at one point in time and later relieved of that responsibility. One commenter stated:

This implies that if an applicant has successfully transferred, assigned or sold a previously held permit, he/she will no longer

be liable for any violations associated with that former permit. Although we understand that the new permittee to whom the former permit was transferred, assigned or sold is now responsible for any outstanding violations, penalties or fees and for appropriate corrective action, some states prefer to hold the original permittee/violator responsible for those violations, regardless of the new permittee's responsibilities until the matter is adequately resolved.

Another of these commenters stated that the proposed provision seemed to allow for a ''liability dump.''

We agree with the substance of these comments. If a person severs an ownership or control relationship to an operation with an outstanding violation, but remains directly responsible for the violation, the person is not eligible to receive a new permit. Likewise, if a person is directly responsible for a violation, he or she cannot avoid a finding that a permit was improvidently issued under the criteria of final § 773.21, or forestall suspension or rescission of a permit under final § 773.23, by severing an ownership or control relationship to the operation with the violation. Further, a regulatory authority may take appropriate enforcement action against a person who continues to be directly responsible for a violation under applicable law.

A commenter supported our proposal to remove the words ''and reclamation'' from previous 30 CFR 773.21(b). In proposed § 773.21(b), we removed this phrase to clarify that after permit suspension or rescission, required reclamation activities must continue. The substance of proposed § 773.21(b) is adopted at final § 773.23(b)(1). Under that section, upon suspension or recission of a permit, all surface coal mining operations must cease; required reclamation must continue.

A commenter objected to the proposed provisions for permit suspension or rescission. In substance, the commenter stated that the proposal denied due process because it improperly allowed permit suspension or rescission without a prior hearing. The commenter also claimed that the opportunity to request a hearing, as proposed, did not provide due process because the effect of the suspension notice would not be automatically stayed pending appeal and the permit would be automatically suspended after a specified period of time, regardless of whether an appeal was filed. The commenter expressed the view that under *Darby* v. *Cisneros,* 509 U.S. 137 (1993), exhaustion of administrative remedies is not required under the Administrative Procedure Act if the effect of the suspension or rescission notice is not stayed pending appeal. The commenter also stated that the temporary relief which may be granted under existing 43 CFR 4.1376 is not an adequate substitute for a pre-deprivation hearing.

The final improvidently issued permits provisions at §§ 773.21 through 773.23 fully comport with due process. As explained above, in section VI.I. of this preamble, the key modifications from the proposed provisions are enhanced due process and public notice. Under final § 773.21, if a permit meets the criteria of paragraphs (a) and (b), the regulatory authority will make a *preliminary finding* that a permit was improvidently issued. The permittee will then have an opportunity to challenge the preliminary finding under final § 773.21(d).

If, after considering any evidence submitted by the permittee, the regulatory authority finds that the permit was in fact improvidently issued, the regulatory authority will issue a written notice of proposed suspension or rescission. *See* final § 773.22(a). The notice will provide 60 days notice if the regulatory authority decides to suspend the permit, and 120 days notice if the regulatory authority decides to rescind the permit. *See* final §§ 773.22(b) and (c).

If the permittee wishes to appeal a notice of proposed suspension or rescission, it must first exhaust administrative remedies. *See* final § 773.22(e). However, in response to the comment pertaining to *Darby,* the decision will not remain in effect while the permittee exhausts administrative remedies. Under final § 773.23(b), if the permittee requests administrative review, we will not suspend or rescind a permit until *after* a permittee exhausts administrative remedies and the administrative body affirms that the permit was improvidently issued. Section 773.23(b) also ensures that the permittee will have a meaningful opportunity for a hearing *before* a permit suspension or rescission.

Finally, if a permit is ultimately suspended or rescinded under final § 773.23, the permittee may seek administrative or judicial review. *See* final § 773.23(d). In response to the comment pertaining to *Darby,* we decided not to require permittees to exhaust administrative remedies before seeking judicial review of a permit suspension or rescission. Thus, the permit suspension or rescission will remain in effect during the pendency of any appeals. Together, the foregoing provisions provide ample due process to permittees by way of meaningful opportunities for pre- and post-suspension or rescission hearings.

K. Section 773.22—Identifying Entities Responsible for Violations

In this final rule, the provisions we adopt from proposed § 773.22 are found at §§ 774.11 and 847.2.

We proposed to revise and redesignate previous § 773.22 and add a new § 773.22, which would have required regulatory authorities to identify entities responsible for violations, enter and maintain that information in AVS, and consider taking alternative enforcement action when appropriate.

We are not adopting § 773.22 as it was proposed. Instead, we have incorporated a revised version of proposed § 773.22(b), (c), and (d) into new § 774.11. Final § 774.11 has its origins in provisions that we proposed at §§ 773.15(b)(3)(i)(D), (E) and (F), (b)(3)(ii); 773.17(k); 773.22(b), (c), and (d); and 774.13(e). From proposed § 773.22, it incorporates the timely entry and update of violation information in AVS (proposed §§ 773.22(b) and (c)) and the use of alternative enforcement actions to compel the abatement or correction of violations (proposed § 773.22(d)).

Proposed § 773.22(d) would have also provided that the existence of a performance bond cannot be used as the sole basis for a determination that alternative enforcement action is not warranted. We are adopting this provision as final § 847.2(b). We received one comment on proposed § 773.22(d), which we discuss in Part VI.AA. of this preamble in connection with final § 847.2(b).

We are not adopting the introductory statement in proposed § 773.22, which provided that a person who owns or controls a surface coal mining operation has an affirmative duty to comply with the Act, the regulatory program, and any approved permit, because it does not add any meaningful value to our existing regulations. We are also not adopting proposed §§ 773.22(a) and (b) insofar as we proposed to determine the identity of persons responsible for outstanding violations and to designate in AVS owners, controllers, principals, and agents as persons we could compel to abate or correct a violation. We determined that we have insufficient basis under SMCRA to automatically ascribe personal liability or responsibility to persons listed in an application for a permit, including owners and controllers.

Final § 774.11—Post-Permit Issuance Information Requirements for Regulatory Authorities and Other Actions Based on Ownership, Control, and Violation Information

Final § 774.11(a) provides that, for purposes of future permit eligibility determinations and enforcement actions, the regulatory authority must enter into AVS: (1) Permit records within 30 days after a permit is issued or a subsequent change to a permit is made; (2) unabated or uncorrected violations within 30 days after the abatement or correction period for the violation expires; (3) changes of ownership and control within 30 days after a regulatory authority receives notice of a change; and (4) changes in violation status within 30 days after abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal. Under final § 774.11(a), regulatory authorities must update and maintain these records in AVS. Final § 774.11(a), which codifies the use and maintenance of AVS, is based upon provisions proposed at §§ 773.22(b), (c), 774.13(e), and 774.14(e). An accurate and complete nationwide database such as AVS is critical to effective and efficient implementation of the permit block sanction of section 510(c) of the Act.

Final § 774.11(b) provides that if, at any time, the regulatory authority discovers a person who owns or controls a surface coal mining operation for which there is an unabated or uncorrected violation, the regulatory authority will determine whether alternative enforcement action is appropriate under part 843, 846 or 847. Final § 774.11(b) further requires that a regulatory authority must enter the results of each enforcement action, including administrative and judicial review decisions, into AVS. Final § 774.11(b) is derived from proposed §§ 773.15(b)(3)(ii) and 773.22(d). This provision emphasizes a regulatory authority's continued obligation to use all available enforcement mechanisms to compel the abatement or correction of unabated and uncorrected violations.

Final § 774.11(c) requires that a regulatory authority serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act, 30 U.S.C. 1260(c), on an applicant or operator if the applicant or operator: (1) controls or has controlled mining operations with a demonstrated pattern of willful violations under section 510(c) of the Act and (2) the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate the applicant's or operator's intent not to comply with the Act, its implementing regulations, the regulatory program, or permit. Final § 774.11(c) further requires that, in making a finding of permanent permit ineligibility, the regulatory authority will only consider control relationships and violations which would make, or would have made, an applicant or operator ineligible for a permit under final §§ 773.12(a) and (b). This provision is consistent with *NMA* v. *DOI II.*

Consistent with section 510(c) of the Act, final § 774.11(d) provides for a hearing under 43 CFR 4.1350 through 4.1356 on a preliminary finding of permanent permit ineligibility. Final § 774.11(d) is based upon proposed § 773.15(b)(3)(i)(E) and (F) and previous § 773.15(b)(3). Final § 774.11(d) is modified from the proposed rule in that we decided not to unnecessarily reiterate the OHA appeals procedures.

Final § 774.11(e) requires that the regulatory authority enter the results of a finding of permanent permit ineligibility and any hearing on such a finding into AVS.

Final § 774.11(f) provides that the regulatory authority may identify a person who owns or controls an entire surface coal mining operation or any relevant portion or aspect of such operation at any time. Final § 774.11(f) enables regulatory authorities to discover owners or controllers of an operation that the applicant has failed to list in an application as required under final §§ 778.11(c)(5) and (d). As explained elsewhere in this preamble, ownership or control of an applicant, permittee, or operator is tantamount to owning or controlling the operation, or relevant portion or aspect of the operation.

In addition, final § 774.11(f) provides that when a regulatory authority identifies such a person, the regulatory authority will: (1) issue a written finding describing the nature and extent of ownership or control; (2) enter the results of the finding into AVS; and (3) require the person to disclose his or her identity under § 778.11(c)(5) and certify as a controller under § 778.11(d), if appropriate. Final § 774.11(f) is based upon proposed § 773.17(k). We are adopting final § 774.11(f) to enable a regulatory authority to identify any owner or controller of an applicant, permittee, or operator that has not been disclosed under the requirements under final § 778.11(c)(5) and (d) to disclose owners and controllers in a permit application.

Final § 774.11(f) is modified from proposed § 773.17(k) to be consistent with the application information requirements at final § 778.11(c)(5) where an owner or controller may be listed in an application as owning or controlling a portion or aspect of a proposed surface coal mining operation. As we indicate below in this preamble in the discussion of final § 778.11(c)(5), it is important that an applicant have the ability to disclose in an application those owners and controllers that own or control only a portion or aspect of a proposed surface coal mining operation as well as the entire proposed operation. In implementing final § 774.11(f), this means a regulatory authority may identify a previously undisclosed owner or controller that owns or controls only a portion or aspect of a surface coal mining operation.

Final § 774.11(f) is also modified from proposed § 773.17(k) to require that the results of any finding made under the provision be entered into AVS.

Paragraph (g) provides that any person whom a regulatory authority finds to be an owner or controller under final § 774.11(f) may challenge the finding using the provisions of final §§ 773.25, 773.26 and 773.27, which provide the procedures for challenging an ownership or control listing or finding.

Comments on Proposed § 773.22

Commenters on proposed § 773.22 opposed mandatory investigations, holding individuals responsible for the violations of corporate permittee, the elimination of permitting recommendations, designating specific persons as those responsible for correcting violations, and use of the term ''agent.'' Commenters opposing proposed § 773.22 expressed the same concerns regarding proposed §§ 773.15, 773.17, 773.24, 773.25, and 778.5. These comments are addressed in sections VI.A., VI.E., VI.G., VI.M., and VI.N. of this preamble.

L. Section 773.23—Review of Ownership or Control and Violation Information

We proposed to remove previous § 773.23 from our regulations, based on our conclusion that it was centered on ownership or control links and based on presumptions of control between applicants and operations with violations. We received no comments on our proposal to remove these provisions. Since our final rule does not incorporate either presumptions of ownership or control or links to violations based upon presumptions of ownership or control, we are removing previous § 773.23 as proposed. However, under final §§ 773.8 through 773.11, a regulatory authority must review all applicant, operator, and

ownership and control information; permit history information; and compliance history (violation) information before making a permit eligibility determination under final § 773.12.

In reorganizing part 773 in this final rule, we have used the section number ''773.23'' for other purposes.

M. Section 773.24—Procedures for Challenging a Finding on the Ability To Control a Surface Coal Mining Operation

In this final rule, the provisions we adopt from proposed §§ 773.24 and 773.25 are found at §§ 773.25 through 773.28.

We proposed to revise previous § 773.24 to provide for challenges to a finding on the ability to control a surface coal mining operation. We modified this section from the proposed rule. We reorganized two sections, proposed as §§ 773.24 and 773.25, into four sections in this final rule and modified the provisions based on comments. The provisions are adopted at final §§ 773.25 through 773.28. A description of these final provisions follows, including discussion of the modifications from the proposed rule. Discussion of these final provisions will not be repeated in the discussion of comments received on proposed § 773.25 in section VI.N. of this preamble.

§ 773.25 Who may challenge ownership or control listings and findings

Section 773.25 provides that any person listed in a permit application or in the Applicant/Violator System (AVS) as an owner or controller, or found to be an owner or controller under §§ 773.21 or 774.11(f), of an entire surface coal mining operation, or any portion or aspect thereof, may challenge the listing or finding under §§ 773.26 and 773.27. Any applicant or permittee affected by an ownership or control listing also may initiate such a challenge. This section is modified from proposed § 773.24(a). We modified the proposed provision in this final rule by adding that any person listed in AVS may challenge such listing, regardless of whether there is a pending permit application. This modification is consistent with § 773.24(a) of our previous regulations. We also clarified that permit applicants and permittees affected by ownership or control decisions also may initiate ownership or control challenges. We decided that a person listed as or found to be an owner or controller may use these procedures at any time. This modification will enhance due process by allowing additional opportunities for challenges. Consistent with the modification to § 778.11(c)(5), which allows for identification of controllers of specific portions or aspects of an operation, and in response to comments, we decided to allow persons to challenge their ownership or control of portions or aspects of an entire surface coal mining operation. Finally, in order to enhance due process, we are not adopting the requirement that a challenge must occur before certification under § 778.11(d). This will allow persons who certify as to their ownership or control of an operation to in effect ''de-certify'' if they can demonstrate that circumstances have changed so that they no longer own or control the operation.

Final § 773.26 How To Challenge an Ownership or Control Listing or Finding

Final § 773.26(a) is modified from proposed § 773.24(b). Proposed § 773.24(b) provided that ownership or control challenges were to be made to the agency with jurisdiction over existing violations. This meant that if there were multiple existing violations in different jurisdictions (State or Federal), the challenger had to initiate separate challenges in each jurisdiction. In response to comments, we modified final § 773.26(a) to provide that in order to challenge an ownership or control listing or finding, a challenger must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials, to the regulatory authority with jurisdiction over a pending permit application or permit, rather than to the agency with jurisdiction over an existing violation. This modification will greatly simplify the provisions by allowing ownership and control challenges to proceed in one forum.

Final § 773.26(b) is modified from proposed § 773.24(d) and provides that the provisions of final §§ 773.27 and 773.28 apply only to challenges to ownership or control listings or findings. We simplified the provision by clarifying that the procedures are limited to challenges to ownership or control listings or findings; no person may use these provisions to challenge any other liability or responsibility under any other provision of the Act or its implementing regulations.

Final § 773.26(c) provides that when the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information. We added paragraph (c) to complement final § 773.26(a). Since the regulatory authority with jurisdiction over a pending permit application or an issued permit will be deciding ownership or control challenges, it is likely that the regulatory authority will not have access to all information regarding violations in other jurisdictions. As such, it is important for the regulatory authority deciding the challenge to consult with these other jurisdictions to obtain necessary background information on violations in order to make an informed decision on a challenge.

Final § 773.26(d) provides that a State regulatory authority with responsibility for deciding an ownership or control challenge may request an investigation by OSM's AVS Office. Like final § 773.26(c), we added this provision to assist State regulatory authorities in deciding challenges. This provision is especially relevant when a State regulatory authority does not have adequate access to the pertinent information. Under this provision, a State regulatory authority may ask us for assistance, by way of investigation, whenever it believes that it does not have adequate information to render an informed decision on a challenge. However, the ultimate responsibility to decide the challenge and issue a written decision rests with the State regulatory authority.

Final § 773.27 Burden of Proof for Ownership or Control Challenges

Final § 773.27(a) provides that when a listing or finding of ownership or control of a surface coal mining operation is challenged, the challenger must prove, by a preponderance of the evidence, that the challenger does not, or did not, own or control that operation. Paragraph (a) is modified from proposed § 773.25(c)(2). At paragraphs (a)(1) and (a)(2) of final § 773.27, we provide that a person may challenge current or past ownership or control. Challenging past ownership or control may be relevant when a challenger is contesting a finding that a permit was improvidently issued under final § 773.21(b). For clarity, in this final rule, we organized the provisions for burden of proof, called evidentiary standards in the proposed rule, into a separate section. We retained the ''preponderance of the evidence'' standard in this final rule.

Final § 773.27(b) provides that a challenger must meet its burden of proof by presenting reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority deciding the challenge.

Paragraph (b) is modified from proposed § 773.25(c)(3). We added to the provision that any evidence or supporting materials presented in connection with the challenge will become part of the permit file, an investigation file, or another public file. This addition is in response to comments that we should expand the public's access to decisions made under these provisions. The addition is also consistent with existing regulations regarding the availability of records. If the challenger requests, we will hold as confidential any information which is not required to be made available to the public under §§ 840.14 or 842.16, as applicable.

Final § 773.27(c) provides some examples of materials a challenger may submit in an effort to satisfy the requirements of paragraph (b). Paragraph (c) is adopted from proposed § 773.25(c)(3)(i). Subparagraph (c)(1) is slightly modified from proposed § 773.25(c)(3)(i)(A). Subparagraph (c)(2) is adopted as proposed in § 773.25(c)(3)(i)(B). Subparagraph (c)(3) is adopted as proposed in § 773.25(c)(3)(i)(C). Subparagraph (c)(4) is adopted from proposed § 773.25(c)(3)(i)(D). There are no substantive changes between final paragraph (c) and the proposed provision.

We did not adopt proposed § 773.25(c)(3)(ii) because it is unnecessary. This proposed provision stated that evidence and supporting material presented before any administrative or judicial tribunal reviewing a decision by a regulatory authority may include any evidence admissible under the rules of such tribunal. We removed this provision because the rules of the tribunal will set forth the evidence that the tribunal may receive; as such, the proposed provision was superfluous.

Final § 773.28 Written Agency Decision on Challenges to Ownership or Control Listings or Findings

Final § 773.28(a) provides that the regulatory authority deciding the challenge will review and investigate any evidence or information a challenger submits under § 773.27 and issue a written decision within 60 days of receipt of the challenge. Paragraph (a) also requires the written decision to state whether the challenger owns or controls the relevant surface coal mining operation, or owned or controlled that operation, during the relevant time period. For clarification and simplification, and to avoid redundancy, we merged proposed §§ 773.25(a), 773.25(b)(1) through (3) and 773.25(c)(1), as well as the first sentence of proposed § 773.24(c)(1), and incorporated them into final § 773.28(a). The regulatory authority referenced in final § 773.28(a) is the agency which will decide the challenge in accordance with final § 773.26(a).

Paragraph (b) of final § 773.28 provides that the regulatory authority will promptly provide the challenger with a copy of the decision by either certified mail or any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or the equivalent State regulatory program counterparts. Paragraph (b) is adopted from the notification procedures in the second sentence of proposed § 773.24(c)(1) and the first sentence of proposed § 773.24(c)(2). In response to comments, we removed the requirement that the regulatory authority directly notify regulatory authorities with an interest in the challenge; the proposed requirement was too subjective, and regulatory authorities will receive ample notice through AVS and our AVS Office's Internet home page (Internet address: www.avs.osmre.gov).

Paragraph (c) of final § 773.28 provides that service of the decision on a challenger is complete upon delivery and is not incomplete if delivery is refused. Paragraph (c) is adopted from the second sentence in proposed § 773.24(c)(2).

Paragraph (d) of final § 773.28 provides that the regulatory authority will post all decisions made under this section on AVS and on the AVS Office Internet home page (Internet address: www.avs.osmre.gov). This provision is added to the final rule in response to comments that we should expand the public's access to decisions made under these provisions. Public notice of a decision, and the availability of the records supporting the decision, adopted in final § 773.27(b), are the appropriate places to expand such accessibility. Public posting of the decisions will also accomplish notice to regulatory authorities.

Paragraph (e) of final § 773.28 provides that any person who receives a written decision—i.e., the challenger—and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387, or the equivalent State regulatory program counterparts, before seeking judicial review. For clarity and simplification, we modified paragraph (e) from proposed § 773.24(c)(3), and added specific mention of the requirement to exhaust administrative remedies. Also, we are not adopting the proposed provision which would allow ''any person who is or may be adversely affected'' by a decision to appeal the decision. As explained below, there are ample public participation provisions in our other regulations.

Finally, paragraph (f) of final § 773.28 provides that, following a written decision by the regulatory authority responsible for deciding the challenge, or any decision by a reviewing administrative or judicial tribunal, the regulatory authority will review the information in AVS to determine if it is consistent with the decision. Paragraph (f) further provides that if the information in AVS is not consistent with the decision, the regulatory authority will promptly revise the information in AVS to reflect the decision. Paragraph (f) is adopted from proposed § 773.25(d) and the second sentence of proposed § 773.24(c)(1).

We are not adopting proposed § 773.25(b)(4) because it is unnecessary. Proposed § 773.25(b)(4) provided that the agency with jurisdiction over a violation will determine whether the violation has been abated or corrected. While this statement is correct, it is not necessary to include it in the regulatory language pertaining to ownership or control challenges. While this final rule makes clear that the regulatory authority responsible for deciding an ownership or control challenge will apply its ownership or control rules to violations both inside and outside its jurisdiction, only the agency with jurisdiction over a violation can properly make decisions regarding the initial existence or current status of the violation.

In response to comments, we are also not adopting the last sentence of proposed § 773.24(c)(3), which would have provided that our written decision would remain in effect during the pendency of an appeal, unless the challenger obtained temporary relief. Instead, as explained in greater detail in section VI.F. of this preamble, we are allowing applicants to obtain provisional permits during the pendency of ownership or control challenges and appeals. *See* final § 773.14. Thus, our ownership or control findings are in effect stayed or inoperative while a challenger exhausts administrative remedies and during the pendency of any subsequent judicial review. Allowing provisional permits under these circumstances enhances due process.

General Comments on Proposed § 773.24

One commenter said the procedures for challenging an ownership or control

listing or finding, or alternately our proposed revisions to the existing challenge procedures, are not needed. This commenter did not offer a reason for the objection. The challenge procedures, in general, are definitely needed for several reasons, but most importantly to afford due process to the regulated industry. Furthermore, the specific revisions we adopted in this final rule are necessary in light of the fact that the nature of the challenges has changed from rebuttals of presumptions of ownership or control to challenges to listings and agency findings of actual, rather than presumed, ownership or control.

In contrast, another commenter expressed support for the intent of due process behind the proposed challenge provisions. We agree with the comment and underscore that it is critically important that persons either disclosed as an owner or controller, or later found by a regulatory authority to be an owner or controller, have the opportunity to challenge such a listing or finding.

A commenter said the provisions proposed in § 773.24 unlawfully preclude persons from challenging the underlying violation to which they are linked and for which they will be held responsible. Expressing a contrary view, another commenter stated that a challenge to an ownership or control link should not include a challenge to the underlying fact of the violation.

In this final rule, we removed the ability to challenge directly both the current status of a violation (i.e., whether the violation has been abated, is in the process of being abated, etc.) and the initial existence or validity of a violation (i.e., whether a violation existed at the time it was cited) in the context of ownership or control challenges. Only the regulatory authority, or other agency, with jurisdiction over a violation can make determinations regarding the initial existence or current status of a violation. Of course, if a person is challenging an ownership or control listing or finding because he or she is ineligible for a permit under section 510(c) of the Act, 30 U.S.C. 1260(c), and final § 773.12—*i.e.,* he or she owns or controls an operation with a current violation—the person may submit evidence *from the regulatory authority, or other agency, with jurisdiction over the violation* that the violation never existed in the first instance or has been abated or corrected. If a person can demonstrate, in this manner, that he or she does not own or control an operation with a current violation, he or she would become eligible for a permit under section 510(c) and final § 773.12.

We removed the ability to challenge the existence of a violation at the time it was cited because there is a prime regulatory interest in finality of agency actions. Allowing the initial existence of a violation to be challenged at any time, in an open-ended process, is neither required by law nor desirable. For example, if a challenge to the existence of a violation is raised years after the fact, it might be difficult, if not impossible, for an agency to obtain all pertinent evidence relating to the violation at the time it was cited. Witnesses might be unlocatable, or even deceased, or their memories may have understandably faded; documentary evidence might be lost or destroyed; and evidence of ''on the ground'' violations might be lost due to the passage of time and changes in physical conditions.

Furthermore, if the existence of a violation has been litigated to conclusion by an affected party, or the right to challenge the existence of a violation has been waived, we see no reason to provide for additional challenges covering the same subject matter. It is not necessary to allow persons who failed to exercise a prior opportunity to challenge the existence of the violation to initiate such a challenge in the context of an ownership or control challenge. Our existing regulations provide that a person issued a Federal notice of violation or cessation order, ''*or a person having an interest which is or may be adversely affected by the issuance, modification, vacation or termination of a notice or order,* may request review of that action * * * within 30 days after receiving notice of the action.'' 30 CFR 843.16 (emphasis added). If ownership or control consequences attach or may attach to a person as a result of the issuance of a notice of violation or cessation order, that person ''is or may be adversely affected by the issuance,'' such that they would have the right, and it would be incumbent on them, to challenge the issuance under the available procedures. If the persons affected by the issuance of a notice of violation do not initiate a challenge, or fail to obtain a favorable decision on such a challenge, then it is fair to assume that the violation did in fact exist when cited.

Likewise, in the event that someone initiating an ownership or control challenge did not have the opportunity to challenge the underlying existence of the violation, the persons legally responsible for the violation will have had ample opportunity and sufficient motivation to challenge the violation if they believe it was improperly cited. If the persons who are legally responsible for the violation do not initiate a challenge, or fail to obtain a favorable decision on such a challenge, then it is fair to state that the violation did in fact exist when cited.

In sum, we emphasize that the ownership or control challenges provided for in this final rule do not exist so that a person may challenge anew the initial existence of a violation. At the same time, the rights of owners and controllers are well protected by the ability to challenge an ownership or control listing or finding under the procedures we adopt today.

A commenter said the final rule should make clear that the documents submitted by a person initiating a challenge and relied upon by regulatory authorities for their decisions are public records and should be made a part of the permit file. We agree with the commenter that documents submitted to challenge an ownership or control listing or finding should normally be considered public records and, as such, should be readily available for public review. Based on this comment, we added the requirement in final § 773.27(b) that any materials presented in connection with a challenge will become part of the permit file, an investigation file, or another public file. However, the location and manner in which the records are retained is at the discretion of the regulatory authority, as identified in final § 773.26(a). We also added a provision allowing a challenger to request that any confidential information not be placed in a public file. We will hold as confidential any information which is not required to be made available to the public under §§ 840.14 or 842.16, as applicable.

A commenter said proposed § 773.24 confuses responsibility for liability and for permit blocking. To paraphrase, the commenter states that the proposed rule assumes that any owner or controller is the alter ego of the applicant and therefore liable for the applicant's violations. In the commenter's view, holding owners or controllers liable for a violation negates the need for ''an elaborate scheme of permit blocking.'' We disagree with the commenter for at least two reasons. First, neither the proposed rule nor the rule adopted today presumes that an owner or controller is the alter ego of the applicant or a permittee, though an owner or controller may in fact, in the circumstances of a given case, be an alter ego. And, while an owner or controller may, in certain circumstances, be personally liable for the violations of an operation under sections 518 and 521 of the Act, 30

U.S.C. 1268 and 30 U.S.C. 1271, neither the challenge procedures, nor any other provision of the final rule adopted today, gives rise to such an assumption. If a person is found to be personally liable for a violation under the Act, that person has ample opportunity to challenge that finding outside of the ownership or control challenge procedures. The pertinent parts of this final rule establish when a person owns or controls the relevant surface coal mining operation, as contemplated by section 510(c) of the Act; the challenge procedures afford due process by allowing a person to challenge an ownership or control listing or finding. Second, this final rule does not create an ''elaborate permit-blocking scheme.'' Rather, this rule implements section 510(c) of the Act in a manner fully consistent with the *NMA* v. *DOI I* and *NMA* v. *DOI II* decisions.

Two commenters asked how a person is notified of a regulatory authority's initial determination that they have the ability to control. A person found to be an owner or controller will be notified by the regulatory authority making the finding. In this final rule, we modified the proposed provision to clarify that the regulatory authority must make a written finding of ownership or control. *See* final § 774.11(f); *see also* final § 773.22(a). The regulatory authority will then notify the person subject to the finding of the determination.

A commenter said the challenge provisions are unlawful because they fail to provide due process, by way of an opportunity for hearing or appeal, ''prior to the imposition of sanctions including permit blocks and conditions based on the [ownership or control] finding, or before the inclusion of the finding or determination in the AVS.''

We disagree that the proposed ownership or control challenge procedures would deny due process, for largely the same reasons explained in the preamble to OSM's Applicant/Violator System Procedures rule (AVS Procedures rule). 59 FR 54306, 54312–16 (1994). The AVS Procedures rule, which contained predecessor ownership or control challenge procedures, was upheld in court against all due process challenges, including an argument similar to the one advanced by the commenter. *National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. (BNA) 1097, 1111–17 (D.D.C. 1996), *appeal docketed,* No. 96–5274 (D.C. Cir). To the extent relevant, we continue to rely on the due process discussion set forth in the preamble to the AVS Procedures rule in support of this rulemaking.

Nonetheless, we modified the final rule to address the commenter's concerns. Most significantly, as explained in greater detail in section VI.F. of this preamble, we decided to allow issuance of a provisional permit when a person is challenging or appealing an ownership or control listing or finding. Under final § 773.14, an applicant who owns or controls an operation with a violation may be eligible for a provisional permit if it is challenging or appealing all pertinent ownership or control listings or findings. However, if an ownership or control listing or finding is ultimately upheld in favor of the regulatory authority, the provisionally issued permit will be considered improvidently issued, and the regulatory authority must initiate suspension or rescission procedures under final §§ 773.22 and 773.23. *See* final § 773.14(c). Thus, under the procedures we adopt today, any negative consequence, or ''sanction,'' flowing from an ownership or control listing or finding—*i.e.,* a permit block or permit suspension or rescission—will only arise *after* an applicant has had a full and meaningful opportunity to challenge the listing or finding both administratively and judicially. It is also important to emphasize that a person may initiate an ownership or control challenge *at any time. See* final § 773.25.

While our modification allowing for provisional permits is alone sufficient to address the due process concerns expressed by the commenter, we note that there are numerous other provisions in this final rule and our existing rules, including provisions which are available before a permit denial, which safeguard the interests of applicants. First, section 513(b) of the Act, 30 U.S.C. 1263(b), allows any person having an interest which is or may be adversely affected by a proposed application to file written objections and seek an informal conference before a permitting decision. Second, under final § 773.25, any person listed or found as an owner or controller, or any applicant affected by such listing or finding, may challenge an ownership or control listing or finding at any time, including before a permitting decision (if the listing or finding occurs before a permitting decision). Third, existing 43 CFR 4.1380 provides for review of OSM's written ownership and control decisions by OHA. Under the OHA procedures at 43 CFR 4.1386, a party may seek temporary relief from OSM's decision upon a showing that, among other things, the petitioner is likely to prevail on the merits of the claim. Finally, if the ownership or control finding results in a permit denial, existing 30 CFR part 775 allows the ''the applicant, permittee, or any person with an interest which is or may be adversely affected'' to seek administrative, and ultimately judicial, review of the permitting decision. Given that applicants may now receive provisional permits while they are appealing ownership or control listings or findings, coupled with the ample recourse an applicant has, both before and after a permitting decision, the risk of an erroneous permit denial is virtually nonexistent.

We do note that under this final rule, we will continue to enter ownership or control findings promptly into AVS. *See* final § 774.11(f)(2). When OSM makes a finding that someone who is not listed in the permit application, or subsequently identified by the permittee, is an owner or controller of the operation, there is a strong governmental and public interest in listing that information in AVS as soon as possible so it may be of use to the various regulatory authorities in carrying out their permitting responsibilities under section 510(c) of the Act. Section 510(c), among other things, prevents violators from receiving new permits so that they will not be able to cause environmental harm at new sites. If OSM or a State regulatory authority had to wait until after a challenge or hearing, and a potentially lengthy appeal to the court of last resort, to list the information in AVS, another regulatory authority may issue a permit to a person who is not entitled to receive one under section 510(c). At a minimum, the permitting authority must have access to the most current and complete information when it makes its permitting decision. The most efficient way to achieve that result is to enter ownership or control findings promptly into AVS.

However, since an applicant may now receive a provisional permit during the pendency of a merits challenge or appeal, there will not be any ''sanction'' or negative consequence flowing from the entry of the finding into AVS unless and until the finding is ultimately upheld. If a finding entered into AVS is ultimately upheld, then any negative consequences will be due to the conduct of the person found to be an owner or controller, or the conduct of operations the person owns or controls. On the other hand, allowance of a provisional permit ensures that there will not be a ''sanction'' to a person subject to an erroneous finding of ownership or control.

We also take this opportunity to emphasize that AVS is an informational

database, which contains, among other things, information pertaining to *all* owners and controllers of all applicants and all permittees, regardless of whether there are outstanding violations. Thus, the mere entry of an ownership or control relationship into AVS is not punitive and may not have any adverse consequences. For example, if a person is identified in AVS as an owner or controller of an operation, there is no adverse permitting consequence unless that operation has a current violation. Even then, under this rule, an applicant will be eligible for a provisional permit if it challenges, in good faith, its ownership or control of the operation.

Each regulatory authority uses the information in AVS, along with other reasonably available information, to determine permit eligibility under its own ownership and control rules. OSM's interest is in maintaining the integrity of the information in the system—both in terms of accuracy and completeness—so that OSM and the States may make informed and appropriate permitting decisions, consistent with final § 773.12 and section 510(c) of the Act. So long as the information is accurate and complete, any negative consequences flowing from being listed in AVS will not be created by OSM, but by the person owning or controlling an operation with an outstanding violation and/or the person who created the violation. In short, it is a person's conduct, and not identification in AVS, which creates any adverse consequences.

In sum, the procedures we adopt today, in conjunction with existing procedures, strike the appropriate balance between due process and OSM's and the public's interest in prompt entry of ownership and control information into AVS.

Several commenters expressed their concerns regarding citizens' participation under these provisions. One commenter said the public should be afforded the same rights of review regarding OSM's ownership and control decisions as exist generally for permit decisions. Another commenter said that we should not weaken citizens' participation in AVS matters. Another said there is a lack of public notice concerning any challenge to a finding of the ability to control and a lack of ability to participate, by comment or intervention, in such proceedings. According to the commenter, this lack of notice and public involvement is inconsistent with the Act.

The rule we adopt today increases the opportunity for public participation in ownership or control challenges, particularly through enhanced notice of ownership or control decisions. We expressly adopted additional notice procedures so that the public will be informed of all written decisions concerning ownership or control challenges. *See* final § 773.28(d). Further, all records supporting an ownership or control decision, excluding any confidential information, will be made available to the public under final § 773.27(b).

Of course, citizens can pursue other avenues of redress if they believe the ownership or control challenge procedures are insufficient to protect their interests. Indeed, the rule we adopt today does nothing to disturb the public's role in the permitting process under 30 CFR 773.13 and 30 CFR part 775, including the ability of persons who have an interest which is or may be adversely affected to raise ownership or control issues during the permitting process and to request a hearing on the reasons for a permitting decision. Additional provisions pertaining to public participation and access to records are found at existing 30 CFR 842.11, 842.12, and 842.16 and final § 843.21. For example, if a person disagrees with an ownership or control finding, he can request a Federal inspection of any relevant permit under 30 CFR 842.12. If OSM denies an inspection request, the person may seek review under 30 CFR 842.15, and may ultimately appeal to OHA under 43 CFR part 4.

Also, as mentioned previously, AVS is available to the public to increase public access to ownership or control information in the system. AVS software is provided free of charge and can be ordered from the AVS Office in Lexington, Kentucky, by calling, toll-free, 1–800–643–9748. The software can also be downloaded from the AVS Office's Internet home page on the Internet (Internet address: *http://www.avs.osmre.gov*).

It should also be noted that section 510(c) of the Act, 30 U.S.C. 1260(c), itself requires regulatory authorities to consider ''other information available'' when determining whether a permit may be granted based on ownership or control considerations. If the public supplies information to the regulatory authority with jurisdiction over an application, the regulatory authority must consider it as ''available information'' in making a permitting decision.

In short, OSM recognizes the Act's requirements for public participation in the permitting process, including ownership or control matters. The rule we adopt today, in conjunction with existing procedures, will provide more immediate, wider, and economical access to persons with an interest in ownership or control challenges. Together, notice of a decision, access to the records underlying that decision, and our existing public participation procedures provide an appropriate measure of public participation in ownership or control challenges.

We also note that the National Wildlife Federation and Kentucky Resources Council, Inc., filed a complaint challenging our 1994 AVS Procedures rule. In that action, plaintiffs claimed, among other things, that the 1994 provisions did not provide for adequate public participation and notice relative to ownership or control determinations. Ultimately, the parties filed a joint motion for voluntary dismissal of the action, based on our agreement to ''reopen the issues and regulatory language complained of in this lawsuit for public comment, and to reevaluate the position of the agency with respect to those matters complained of in this case,'' including the role of the public in ownership and control determinations. By order of September 15, 1997, the court granted the joint motion. In this rulemaking, we fulfilled the commitment we made in the joint motion by reopening the issues complained of in the lawsuit, and reevaluating our position relative to those issues. We carefully considered all the comments received on our proposed ownership or control challenge procedures. As explained above, in this final rule, we expand public access to written decisions concerning ownership or control challenges, and provide for public access to the records underlying such decisions. In terms of our ownership or control challenge procedures, these provisions represent an appropriate level of public participation and notice, given the ample public participation provisions which exist in our other regulations.

One commenter said that there is a lack of clarity regarding the right to challenge ownership or control when a regulatory authority's finding of control is necessitated by the applicant's nondisclosure of required permit application information. Any challenge, this commenter explained, should occur in the context of a civil or criminal prosecution for fraud under section 518 of the Act. We disagree that a regulatory authority should immediately initiate civil proceedings or proceed to criminal prosecution in all instances of nondisclosure of required information, from the most benign to the most egregious. However, we fully intend to pursue these actions when they are warranted.

Another commenter said that the refocusing of the challenge to whether the person has the current ability to control is inappropriate. The question, according to the commenter, is whether the applicant owned or controlled other operations which have current violations, not whether the current ability to control continues. After the *NMA* v. *DOI II* decision, we may no longer deny a permit to an applicant who has relinquished its ownership or control of an operation with a still-existing violation. *NMA* v. *DOI II*, 177 F.3d at 5. The court did hold, however, that OSM may continue to deny permits based on an applicant's past ownership or control of an operation with a violation (whether or not abated) when determining whether there is ''a demonstrated pattern of willful violations'' under section 510(c) of the Act. *Id.* Absent the requisite ''pattern of willful violations,'' the court held that a permit denial based on past ownership or control ''contravenes the statute and cannot be upheld.'' *Id.*

Proposed § 773.24(a)

Proposed § 773.24(a) addressed who may challenge a finding on the ability to control a surface coal mining operation. 63 FR 70580, 70621.

A commenter said that it is not clear that a permit applicant can challenge a listing under the proposed provisions. We did not intend to exclude applicants or permittees from being able to challenge an ownership or control listing or finding. *See* 63 FR 70599. We modified the language in this final rule to clarify that an applicant or permittee who is affected by an ownership or control listing or finding may indeed challenge the listing or finding in accordance with these final challenge procedures. *See* final § 773.25(c). However, if an applicant or permittee is initiating a challenge with regard to an ownership or control relationship initially disclosed by the applicant or permittee, we do not expect the challenge to be premised on the argument that the person listed by the applicant or permittee was not an owner or controller in the first instance. An applicant or permittee, having identified a person as an owner or controller, should not prevail in a challenge by claiming the person was not an owner or controller at the time the information was submitted to the regulatory authority. Rather, a challenge initiated by an applicant or permittee, concerning a listing made by the applicant or permittee, should be limited to changed circumstances, like the fact that the person listed by the applicant or permittee as an owner or controller has relinquished ownership or control of the operation.

Several commenters submitted comments pertaining to the timing of ownership or control challenges and the consequences of certifying under proposed § 778.13(m) or being found to be an owner or controller after permit issuance. Under proposed § 773.24(a), an ownership or control challenge had to be initiated ''before certification under [proposed] § 778.13(m).'' Proposed § 778.13(m) would have required all owners or controllers to certify as to their ability to control the operation.

Another commenter, without explanation, suggested that we remove the ''before certification'' requirement. One commenter pointed out that if a regulatory authority made a finding of ownership or control after certification, the person subject to the finding could not challenge the finding since it would have occurred after certification. Another commenter opined that if a person ''fails to challenge the listing [by an applicant or regulatory authority] * * * prior to issuance of the permit, the person is forever deemed to be [an] owner/controller.'' This same commenter noted that if a person was listed or found to be an owner or controller after permit issuance, the person would ''be placed in jeopardy through no action of his own, but merely by the action of others (applicant or [regulatory authority]) without there ever being any burden of proof [borne] by the applicant or [regulatory authority].''

Another commenter said that there could be lengthy delays in permit issuance if a person chose to challenge a listing or finding before permit issuance; on the other hand, if the person did not challenge before permit issuance, they would waive their right to do so at a later time. Finally, a commenter stated that the proposed rule required all listed owners or controllers to challenge their ownership or control before permit issuance or else they would all have to certify. The commenter also stated that requiring successful challenges and/or certification by all owners or controllers before permit issuance would be particularly burdensome to large corporations with many owners or controllers. As such, the commenter suggested we delete the provision in its entirety.

These comments were all well-taken. In this final rule, we are not adopting the ''before certification'' language in final § 773.25. As such, any person either listed as or found to be an owner or controller may challenge such listing or finding at any time, either before, or after, permit issuance. The adopted provision will reduce perceived delays in permit issuance, since a challenge can be initiated after permit issuance.

Removal of the ''before certification'' requirement also alleviates the concern that a person may ''be placed in jeopardy through no action of his own * * * without there ever being any burden of proof [borne] by the applicant or [regulatory authority].'' We note that both regulatory authorities and applicants do bear a burden of proof. If a regulatory authority makes a finding of ownership or control, it bears the initial burden of demonstrating ownership or control; only then does the burden shift to the challenger to prove by a preponderance of the evidence that he or she does not or did not own or control the operation. (The burden of proof is discussed in more detail in section VI.N. of this preamble.) As to being listed as an owner or controller, we note that the applicant has the burden to provide accurate and complete information in a permit application. Despite these burdens of proof, there is obviously a possibility that a person will be erroneously listed or found as an owner or controller. However, any perceived jeopardy can be eliminated by a successful challenge; in fact, these challenge procedures were developed largely for this reason.

Finally, since we modified the certification requirement at final § 778.11(d) to require certification by only one individual, and have modified the challenge procedures to allow for challenges at any time, including after permit issuance, we removed the perceived burden for large corporations. While corporations must still list all of their owners or controllers under final § 778.11(c)(5), only one controller must certify under final § 778.11(d), and any listed owner or controller may initiate a challenge after permit issuance.

Another commenter alluded to the timing issue, but in a slightly different context. This commenter raised the concern that after permit issuance, a person who controls a small portion of an operation (and is therefore listed as a controller), but has no control over areas where a violation occurs, would not be able to use the challenge procedures. The commenter said ''the only avenue of appeal would be the administrative court system.''

As stated above, we addressed the commenter's concern about being able to challenge after permit issuance by removing the ''before certification'' language. In response to this comment, we also modified final § 773.25(a) to allow a person to challenge their ability

to control a specific portion or aspect of an operation. For example, under the commenter's hypothetical, the controller of a small portion of an operation could initiate a challenge and attempt to prove that he does not or did not control another aspect of the operation. We also modified final § 778.11(c)(5) to allow applicants to identify the particular portion or aspect of the operation owned or controlled by each owner or controller.

Proposed § 773.24(b)

Proposed § 773.24(b) addressed how to challenge a finding on the ability to control a surface coal mining operation. 63 FR 70621.

A commenter said the proposal conflicts with the allocation of authority under SMCRA by balkanizing the process whereby a person will have to seek determinations in different State and Federal forums for the same questions related to a finding or decision on control.

We agree that the proposal dispersed the challenge procedures. For example, under the proposal, if an applicant was applying for a permit in State X, but was not eligible for a permit based on ownership or control of operations with violations in States Y and Z, he would have to initiate challenges in States Y and Z (to the agencies with jurisdiction over the violations). We modified the procedures in final § 773.26(a) to provide that in order to challenge an ownership or control listing or finding, a challenger must submit a written explanation of the basis for the challenge to the regulatory authority with jurisdiction over a pending permit application or permit, rather than to the agency with jurisdiction over an existing violation. As explained above, this modification will greatly simplify the provisions by allowing ownership and control procedures to proceed in one forum. The regulatory authority hearing the challenge will apply its own ownership and control rules in deciding the challenge, subject only to OSM's general oversight authority. Consistent with the concept of State primacy, it is appropriate for the regulatory authority with jurisdiction over an application or permit to decide ownership or control challenges, since that regulatory authority has the greatest interest in whether or not mining should commence or continue within its jurisdiction. However, when a regulatory authority is deciding a challenge which involves questions pertaining to violations in other jurisdictions, it is important for that regulatory authority to consult and coordinate with the regulatory authority with jurisdiction over the violation and our AVS Office; we require such consultation in final § 773.26(c).

At the same time, we must stress that a regulatory authority deciding an ownership or control challenge has *no* authority to make determinations relating to the initial existence or current status of a violation, or a person's responsibility for a violation, in another jurisdiction. Rather, all questions as to the existence or status of the violation must be addressed to the regulatory authority, or other agency, with jurisdiction over the violation, providing the challenger is not foreclosed from initiating such a challenge under the applicable regulations. As such, if a challenger has violations in different jurisdictions which are affecting his permit eligibility, and wishes to contest the initial existence or status of those violations, and is not foreclosed from doing so, he must do so with the regulatory authorities, or other agencies, with jurisdiction over the violations; this is consistent with the concept of State primacy embodied in the Act. It is also consistent with section 510(c) of the Act, which requires a permit applicant to prove that any violation it owns or controls has ''been corrected * * * to the satisfaction of the regulatory authority * * * which has jurisdiction over such violation.''

In sum, the procedure we are adopting today enhances State primacy by allowing each regulatory authority to apply its own ownership or control rules when deciding ownership or control challenges pertaining to applications and permits within its jurisdiction. The rule also underscores that each regulatory authority is properly responsible for deciding issues pertaining to the existence or status of a violation within its jurisdiction and ultimately permit eligibility.

Proposed § 773.24(c)

Proposed § 773.24(c) addressed the written decision, service, and appeals procedures under the provisions for challenge a listing or finding of ownership or control. 63 FR 70580, 70621.

Proposed § 773.24(c)(1) would have required the regulatory authority issuing a written decision on an ownership or control challenge to notify the challenger and ''any regulatory authorities'' with an interest in the challenge. A commenter said OSM should clarify the term ''regulatory authorities,'' as used in proposed § 773.24(c)(1), to mean only ''SMCRA regulatory authorities.'' Four commenters asked OSM to clarify how a regulatory authority discovers and notifies all regulatory authorities with an interest in the challenge. One asked if ''regulatory authorities with an interest in the challenge'' includes ''air and water authorities'' and at what point in the permitting process must the decision and notification occur.

At the outset, we note that the term ''regulatory authority'' is defined in the Act, at section 701(22), to include only regulatory authorities administering SMCRA. As such, the term regulatory authorities in § 773.24(c)(1) encompassed only SMCRA regulatory authorities, and not ''air and water authorities.'' However, these comments are largely moot because, as explained above, we modified the notification requirements such that the regulatory authority does not have to directly notify regulatory authorities with an interest in an ownership or control challenge. The proposed requirement was too subjective. Both SMCRA and non-SMCRA regulatory authorities, as well as the general public, will receive ample notice of ownership or control decisions through the posting of those decisions on AVS and our AVS Office's Internet home page under final § 773.28(d). This modification will eliminate any concerns about identifying and notifying interested regulatory authorities.

Finally, we note that a decision does not necessarily occur during the permitting process, though a regulatory authority may receive an ownership or control challenge during the permitting process. The written decision requirement for ownership or control challenges is not triggered by the permitting process, but by receipt of a challenge under these provisions. Notification to the challenger, and posting of the decision on AVS and the Internet, must occur after the written decision, in accordance with the provisions we adopt today.

Two commenters, concerned about potential delays in the permitting process, said there should be a time limit for issuing a written decision under the ownership or control challenge provisions. One of the commenters suggested 30 days, while the other said 15 days is adequate to make a decision.

While in the past we elected not to set a time limit for regulatory authorities to decide ownership or control challenges (*see* 59 FR 54306, 54332–33), we modified the proposal to require regulatory authorities to decide ownership or control challenges within 60 days of receipt of a challenge and any evidence submitted by the challenger. *See* final § 773.28(a). Our experience

since the promulgation of similar ownership or control challenge procedures in 1994, and the fact that OSM and State regulatory authorities have become increasingly sophisticated in processing these challenges, leads us to conclude that the imposition of a 60 day time limit is practical.

Another commenter objected to there being no time limits for the agency to reach a decision at the ''ALJ or IBLA levels.'' To the extent the commenter meant to refer to the lack of a time limit for a written decision in the proposed ownership or control challenge procedures, our response is as above. If the commenter truly meant to refer to OHA's regulations, no response is necessary, as those provisions are not at issue in this rulemaking. We note, however, that OHA's provisions for review of written ownership or control decisions do in fact contain specific time limits for filing of requests for review, answers or responsive motions, hearings, and decisions. 43 CFR 4.1380 through 4.1387.

A commenter said that the OHA appeal procedures referenced in proposed paragraph (c)(3)—43 CFR 4.1380 through 4.1387—were not designed to address what the commenter calls ''expanded control findings'' and thus, do not apply. The commenter also said that the OHA procedures are woefully inadequate to provide due process.

We disagree. The referenced OHA procedures, captioned ''Review of Office of Surface Mining Written Decisions Concerning Ownership and Control,'' are broad enough to encompass appeals of written ownership or control decisions under this final rule. While some of the terminology in the OHA provisions does not precisely match the terminology in this final rule, the substance of the OHA appeals procedures readily accommodates the review of ownership or control decisions contemplated by these final challenge procedures. Nonetheless, in light of this rulemaking, OHA is currently determining whether or not it will be necessary to modify its procedural rules. The existing OHA procedures are more than adequate in the interim, and will in fact apply until such time as they are revised or replaced.

As to the commenter's other concern about the OHA provisions—that they do not provide due process—no response is necessary, as those provisions are not at issue in this rulemaking. We note, however, that the OHA provisions, coupled with the provisions of this final rule, afford ample due process to the regulated industry.

The same commenter, citing *Darby* v. *Cisneros*, 509 U.S. 137 (1993) and *Coteau Properties Co.* v. *Babbitt*, 53 F.3d 1466 (8th Cir. 1995), said that we cannot ''require exhaustion of administrative remedies unless the effect of the [ownership or control] finding or decision is automatically stayed pending appeal.''

Under this final rule, ownership or control findings are in effect stayed while a challenger exhausts administrative, as well as judicial, remedies. This is so because an applicant may receive a provisional permit under final § 773.14 during the pendency of an ownership or control challenge under final §§ 773.25 through 773.27, or any subsequent administrative or judicial appeal. *See* final § 773.14(b)(3). Thus, the potential effect of an ownership or control finding—*i.e.*, permit blocking under section 510(c)—is stayed while a challenger pursues both administrative and judicial remedies. As such, we can properly require exhaustion of administrative remedies before a challenger seeks judicial review. We have added a mandatory exhaustion requirement to final § 773.28(e).

Proposed § 773.24(d)

Proposed § 773.24(d) addressed the limitations under these provisions. 63 FR 70580, 70621. We did not receive any comments on this proposed provision. We slightly modified the proposed provision, in final § 773.26(b), to provide that no person may use these provisions to challenge their liability or responsibility under any other provision of the Act or its implementing regulations; in the proposal, we only referenced liability for reclamation fees assessed under Title IV of SMCRA. This modification is appropriate in order to emphasize that these procedures apply only to ownership or control challenges, and may not be used as a secondary source to challenge liability or responsibility under the other provisions of SMCRA or its implementing regulations.

N. Section 773.25—Standards for Challenging a Finding or Decision on the Ability To Control a Surface Coal Mining Operation

In this final rule, the provisions proposed at §§ 773.24 and 773.25 are found at §§ 773.25 through 773.28.

We proposed to revise previous § 773.25 to provide standards for challenging a finding or decision on ownership of or the ability to control a surface coal mining operation. 63 FR 70580, 70600. We modified proposed § 773.25 in this final rule. The details of the modifications are set forth in the discussion of proposed § 773.24, in preceding section VI.M. of this preamble. Section VI.M. includes a discussion of the final ownership or control challenge provisions at §§ 773.25 through 773.28.

General Comments on Proposed § 773.25

A commenter found the provisions ''puzzling.'' The commenter questioned why we need a rebuttal mechanism if regulatory authorities are no longer allowed to make presumptions of control. The commenter asked, if all controllers certify as to their ability to control, then ''how can they back-pedal and decide later that they don't?''

First, the challenge procedures we adopt today are not, strictly speaking, a rebuttal mechanism. Despite the fact that OSM can no longer rely on presumptions to make a *prima facie* case of ownership or control, we may still, at any time, make findings of ownership or control under §§ 774.11(f) and 773.21. Thus, while the challenge provisions are no longer centered on presumptions of ownership or control, it remains important for any owner or controller to be able to challenge an ownership or control listing or finding. Should a person disagree with a regulatory authority finding that the person owns or controls a surface coal mining operation, then the person should have the right to challenge that finding.

Further, as stated in section VI.M., above, we modified the certification requirement at final § 778.11(d) to require certification by only one individual; thus, not all owners or controllers will have knowingly certified to their status. Still, applicants must list all of their owners or controllers under § 778.11(c). Thus, persons will be listed as an owners or controllers in a permit application, even though they are not required to certify. Under these circumstances, it is important to allow these persons to initiate challenges. On the other hand, if a person has certified as to control of an operation, or the applicant is initiating a challenge with regard to a listing made by the applicant in a permit application, we expect that any challenge will involve changed circumstances, and will not contest the validity of the certification or listing in the first instance. In other words, a person or applicant, having knowingly certified or made a listing, should not be able to ''back-pedal,'' as the commenter put it, and claim that the certification or listing was incorrect in the first instance. At the same time, it is

desirable to create a mechanism whereby a person or applicant can attempt to demonstrate that circumstances have changed since the certification or listing, such that a person is no longer an owner or controller of the operation.

Another commenter said the proposed regulation fails to provide meaningful standards for contesting an ownership or control finding, and that the proposed evidentiary standards are not substitutes for concrete standards for how one can successfully prove an error in a regulatory authority's finding.

We disagree. When OSM makes a finding on ownership or control, the written decision will contain an explanation of the basis for the finding. In bringing a challenge, there is really only one meaningful standard: A person bears the burden of proving by a preponderance of evidence, that he does not, or did not, own or control the relevant surface coal mining operation, under the ownership or control definitions we adopt today at final § 701.5. These definitions are sufficiently clear to allow for a meaningful challenge. The proof provided by the challenger should address the specific items in the finding with which the person takes issue. By not limiting the challenge to ''concrete'' criteria, the challenger is given substantial leeway to present any and all evidence which may be germane to the challenge. At the same time, regulatory authorities are not faced with having to reverse a listing or finding when a challenger meets a technical standard, but there are nonetheless indicia of ownership or control. This approach allows challengers to present, and regulatory authorities to consider, all the pertinent facts of each case, including the peculiar operating structure of a given entity. Further, providing ''concrete'' standards would mean attempting to anticipate every circumstance that would precipitate a challenge; this is not feasible. Finally, we also note that our 1994 AVS Procedures rule, which did not contain detailed standards for rebutting presumptions of ownership or control, was upheld in court against a challenge which was similar to this comment. *National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. (BNA) 1097, 1115–16 (D.D.C. 1996), *appeal docketed,* No. 96–5274 (D.C. Cir).

Proposed § 773.25(a)

We proposed paragraph (a) to state when the challenge standards apply. 63 FR 70580, 70621. We did not receive comments on this proposed provision. However, we are not adopting proposed § 773.25(a) because it would be a duplicate regulatory provision. Applicability is addressed at final § 773.25.

Proposed § 773.25(b)

As proposed, paragraph (b) described which regulatory authorities are responsible for deciding ownership or control challenges. 63 FR 70580, 70621. As explained above, in section VI.M. of this preamble, we modified this provision in this final rule by incorporating it into final § 773.26, which, in conjunction with final § 773.28, identifies the regulatory authorities responsible for deciding ownership or control challenges.

A commenter said that it is conceivable that there will be inconsistent determinations made regarding ownership or control if there are both Federal and State violations. The commenter asserted that ownership or control decisions can only be made by the agency with the application before it and that the decision on abatement of a violation is the only appropriate decision for another agency (when another agency issued the violation).

We agree. As we explained in detail in the discussion of proposed § 773.24(b) in section VI.M., above, under this final rule, the regulatory authority with jurisdiction over a pending permit application or permit will apply its ownership and control rules to all outstanding violations, if any. Only a regulatory authority, or other agency, with jurisdiction over a violation will decide issues pertaining to the initial existence or status of the violation. Nonetheless, there is still potential for inconsistent decisions among different regulatory authorities, since regulatory authorities likely will not have identical ownership and control regulations. To the extent there are inconsistent ownership or control decisions based on the same violations, such a result is consistent with the primacy scheme established by SMCRA itself.

Three commenters questioned proposed § 773.25(b)(3), which provided that the regulatory authority which processed the permit application or which issued the permit will decide challenges not associated with violations. The commenters asked what administrative or judicial venues are available to an applicant to resolve disagreements if the information supplied by one regulatory authority to another is wrong and the incorrect information results in a permit denial. The commenters also stated that OSM should require regulatory authorities to validate their information before entry into AVS, specify the administrative and judicial venues in which erroneous permit blocks can be challenged, and specify that application review can continue during the pendency of ownership or control appeals.

We note that we incorporated proposed § 773.25(b)(3) into final § 773.26(a), such that the regulatory authority with jurisdiction over an application or permit will now decide all ownership and control challenges, regardless of the existence or non-existence of a violation. The challenge procedures we adopt today are designed to resolve questions of ownership or control. Questions as to the correctness of any other information contained in AVS, such as information required to be submitted in permit applications or information pertaining to the existence or status of violations, should be addressed to the regulatory authority which was responsible for entering that information into AVS. An applicant may or may not have recourse depending on whether the time to challenge such information has lapsed under the applicable regulations. However, we are confident, and our experience bears out, that in the case of truly incorrect information, such as information inaccurately loaded into AVS, regulatory authorities which loaded the information will work with the applicant and other persons to see that the information is corrected. Regulatory provisions are not necessary to accomplish this goal.

Likewise, additional regulatory language is not needed to require regulatory authorities to validate information before loading it into AVS. First, much of the information in AVS originates with applicants themselves, under our permit application information requirements; applicants are required to provide accurate and complete information. Further, under final § 773.15(a), regulatory authorities are required to find that an application is accurate and complete. Finally, there is ample opportunity to challenge other data in AVS, such as ownership or control findings, under existing rules and the rules we adopt today.

As to the appropriate administrative or judicial venues in which to challenge ''erroneous permit blocks,'' the rule we adopt today, at final § 773.26(a), clearly identifies how and to whom to submit challenges regarding ownership or control listings and findings. Further, if an ownership or control finding results in a permit denial, existing 30 CFR part 775 provides for administrative and judicial review of the permitting decision. The appropriate forums in

which to initiate such challenges are identified in the regulations.

Finally, it is not necessary to provide rule language specifying that application review can continue during the pendency of ownership or control appeals. There is nothing in our regulations which suggests that application review must be suspended during the pendency of ownership or control appeals. As such, we expect that regulatory authorities will continue to process applications while appeals are pending, unless there is an independent provision of law which requires application review to be put on hold.

Proposed § 773.25(c)

We proposed paragraph (c) to provide for the evidentiary standards in the challenge procedures. 63 FR 70580, 70621. In this final rule, parts of proposed § 773.25(c) have been adopted in final § 773.27. Proposed § 773.25(c)(1) has been modified and incorporated into final § 773.28. Proposed § 773.25(c)(2) is modified and adopted at final § 773.27(a). Proposed § 773.25(c)(3) is modified and adopted at final § 773.27(b). Proposed § 773.25(c)(3)(i) is modified and adopted at final § 773.27(c). As explained in the discussion of final § 773.27(c), in section VI.M. of this preamble, we are not adopting proposed § 773.25(c)(3)(ii) because it is unnecessary.

We received numerous comments on the proposed rule's burden of proof allocation for ownership or control challenges. In this final rule, as in the proposal, the ultimate burden of proof in ownership or control challenges is on the challenger, rather than the regulatory authority.

Two commenters approved of the proposed burden of proof allocation. In substance, the commenters said it was appropriate that the burden of proof is on the person challenging a regulatory finding and the preponderance of the evidence standard is appropriate.

One commenter said the regulatory authority, not the challenger, should bear the ultimate burden of proof. Another said that the burden of proof in ownership or control challenges should always lie with the regulatory authority, especially since under the proposed rule, in the commenter's view, ''to find that an individual is a controller is to also find that he is responsible for misdeeds committed by the mining company.''

Two commenters said it was inappropriate to place a preponderance of the evidence standard on the challenger, while the agency does not have to make a *prima facie* showing of ownership or control. Similarly, another commenter stated that there is never any burden of proof borne by the regulatory authority.

Two commenters, citing *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267, 278–281 (1994), said the Administrative Procedure Act (APA) governs the burden of proof for these procedures, and places the ultimate burden of persuasion on the regulatory authority. One said the proposal,

> violates the APA's allocation of the burden of proof. The APA places the burden of proof (both the burden of going forward with proof and the ultimate burden of persuasion) on the proponent of the rule, i.e., the finding, made by the regulatory authority.

Since the above-identified comments all pertain to the challenger's burden of proof, as well as the regulatory authority's burden of proof, we will address all burden of proof comments together.

First, we want to remove any confusion about the determination which is required by a regulatory authority when it makes an ownership or control finding. Under final § 774.11(f), the regulatory authority must make a written finding of ownership or control. Although the preamble to the proposed rule indicated that the regulatory authority does not have to make a *prima facie* determination, we meant the regulatory authority no longer has to make a *prima facie* determination with regard to rebuttable presumptions, since the proposed rule did not employ the rebuttable presumption mechanism. However, we want to make clear that in making a finding under final § 774.11(f), the regulatory authority must indeed make a *prima facie* determination of ownership and control, based on the evidence available to the regulatory authority. In making a *prima facie* determination, the finding should include evidence of facts which demonstrate that the person subject to the finding meets the definition of *own, owner,* or *ownership* or *control* or *controller* in § 701.5 of this final rule.

As to the applicability of the APA, and the import of the Supreme Court's decision in *Greenwich Collieries,* we begin with the threshold observation that the burden of proof in formal adjudications under the APA does not constrain OSM's informal adjudications, such as the challenges provided for in this final rule. Secondly, even if the APA applies to informal adjudications, SMCRA itself expressly excepts ownership or control challenges from the APA's burden of proof provisions. Finally, even if the APA's burden of proof provisions are applicable to these final challenge procedures, the burden shifting mechanism we adopt today is consistent with the APA and *Greenwich Collieries.*

Section 556(d) of the APA provides, in pertinent part: ''Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'' 5 U.S.C. 556(d) (emphasis added). SMCRA provides otherwise, and thus exempts ownership or control challenges from the APA's burden of proof requirements. Section 510(a) of SMCRA, 30 U.S.C. 1260(a), provides that ''[t]he applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program,'' including section 510(c) of SMCRA. Similarly, under section 510(b), the applicant bears the ultimate burden of proving compliance with all requirements of SMCRA, including section 510(c), and of State and Federal programs. *See also National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. at 1108. Finally, section 510(c) prohibits permit issuance until the applicant proves that there are no outstanding violations at operations owned or controlled by the applicant, or that any violations are in the process of being corrected. *See also id.* (We also note that section 510(c) is silent as to how an applicant may prove that he does not own or control a surface coal mining operation; the burden of proof allocation in this final rule is a reasonable construction of the statute, and appropriately implements section 510(c).) These sections clearly establish that the ultimate burden of proof in ownership or control challenges is properly borne by a permit applicant. Also, the burden of proof we adopt today appropriately applies to both applicant and non-applicant challengers, since the primary purpose of ownership or control findings, and therefore challenges, is to evaluate both present and future eligibility for permits. *See,* e.g., *National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. at 1108.

Greenwich Collieries clarified that ''burden of proof'' means the ultimate ''burden of persuasion.'' 512 U.S. at 276. Under the procedures we adopt today, OSM bears the burden of going forward with evidence to establish ownership or control (i.e., OSM must make a *prima facie* determination). The burden then shifts to the challenger to prove, by a preponderance of the evidence, that he does not, or did not, own or control the relevant surface coal mining operation. If OSM does not match that evidence, the challenger will prevail. The ultimate

burden of persuasion is properly borne by the applicant because SMCRA requires as much, but also because the challenger is most likely to be in possession of evidence to counter the regulatory authority's *prima facie* case. Under these circumstances, it is appropriate to require the challenger to produce the evidence which it has access to in attempting to rebut OSM's *prima facie* finding. This burden shifting mechanism is fully consistent with both the APA and *Greenwich Collieries.* We also note that a similar burden of proof allocation, contained in our 1994 AVS Procedures rule, was upheld against industry challenge after the decision in *Greenwich Collieries. See National Mining Assoc.* v. *Babbitt,* 43 Env't Rep. Cas. at 1108–09.

A commenter said that the lack of a reference in the challenge procedures to the ''standards'' for determining who is an owner or controller suggests that the ''standards'' elsewhere in the proposed rule are rebuttable presumptions which may be challenged. We disagree. The only issue in an ownership or control challenge is whether or not the challenger owns or controls, or owned or controlled, the relevant surface coal mining operation under the definitions of *own, owner,* or *ownership* or *control* or controller contained in § 701.5 of this final rule.

A commenter said the provision regarding submission of opinions of counsel as evidence in ownership or control challenges should be stricken. The commenter said that it is obvious that an attorney would be willing to sign statements supporting the cause of his client and that a statement ''simply saying that this person is or is not a controller is not worthy evidence.'' We retained this provision, first adopted in the 1994 AVS Procedures rule, because it has continued efficacy. In this final rule, we rely upon the rationale for the opinion of counsel provision as stated in the 1994 rule. *See* 59 FR 54306, 54342–43.

Proposed § 773.25(d)

We proposed § 773.25(d) to require regulatory authorities to update AVS, as necessary, upon an agency determination pertaining to ownership or control or the issuance of a decision by a reviewing tribunal. 63 FR 70580, 70621. We did not receive comments on this proposed provision. We slightly modified the proposed provision and adopted it at final § 773.28(f).

O. Section 774.10—Information Collection

In this final rule, the provision proposed as § 774.10 is found at § 774.9.

We proposed to revise the information collection burden for part 774. We are redesignating § 774.10 as new § 774.9 which contains the information collection requirements for part 774 and the Office of Management and Budget (OMB) clearance number. For our response to comments on general information collection, see the discussion under proposed § 773.10 which appears in section VI.D. of this preamble.

In this final rule, § 774.9(a) is revised to show the new OMB clearance number for this part is 1029–0116. The provision under § 774.9(b) is revised to adjust the estimated public reporting burden from 32 hours to 8 hours. The estimate represents the average response time. The reduction in burden is predominantly due to a calculation error on the provisions in the proposed rule. The proposed rule inadvertently provided the total burden hours for each response, as if respondents were always to prepare a permit revision, permit renewal, a transfer, assignment or sale of permit rights all at the same time, not the average burden per respondent to complete the requirements of part 774. In addition, new §§ 774.11 and 774.12 are added in this final rule. Section 774.11 requires regulatory authorities to identify entities responsible for violations, maintain information in AVS, and take enforcement actions based upon ownership, control, and violation information. Section 774.11 is based on provisions proposed in §§ 773.15, 773.22, and 774.13. Section 774.12 requires permittees to provide new or updated information to regulatory authorities. Section 774.12 is based on provisions proposed in §§ 773.17 and 774.13. The estimate represents the average response time.

Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours for part 774 should be 50, instead of 32 hours. We compared the commenter's estimate with other data collected from industry sources and found them inconsistent. In performing the comparison, we took into account the addition of new §§ 774.11 and 774.12. As such, we did not accept the comment.

P. Section 774.13—Permit Revisions

In this final rule, the provision we adopt from proposed § 774.13(e) is found at § 774.12(c).

We proposed to add paragraph (e) to existing 30 CFR 774.13 to require a permittee to report to the regulatory authority any change of an owner or controller where the officer, owner, or other controller is not identified in the current permit and is not subject to the certification requirements for owners and controllers under proposed § 778.13(m). A change of an officer, owner, or other controller meeting these criteria would have to be reported within 60 days of the change and approved as a permit revision.

We are not adopting the proposal to add paragraph (e) to § 774.13. Instead, we added new § 774.12, which is also based upon the ownership and control information update requirements of proposed § 773.17(h).

Final § 774.12—Post-permit Issuance Information Requirements for Permittees

Final § 774.12(a) provides that, within 30 days after the issuance of a cessation order under § 843.11, or its State regulatory program equivalent, a permittee must provide or update all the information required under § 778.11. Final § 774.12(b) provides that a permittee does not have to submit this information if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect. These provisions of the final rule are substantively identical to previous § 773.17(h).

Final § 774.12(c) provides that, within 60 days of any addition, departure, or change in position of any person identified in the permit application as an owner or controller of the applicant or operator under final §§ 778.11(c) or (d), the permittee must provide the information required under final § 778.11(e). That information includes, for each owner or controller, the person's name, address, and telephone number; the person's position title, relationship to the applicant, percentage of ownership, and location in the organizational structure; and the date the person began functioning in the relevant position. Final § 774.12(c) is based upon proposed § 774.13(e). Requiring timely updates of this information will enable the regulatory authority to make more accurate and timely permit eligibility determinations under section 510(c) of the Act.

Disposition of Comments on Proposed § 774.13(e)

A commenter said proposed § 774.13(e) is unnecessary because there is no reason to report changes of individuals unless they are the alter ego of the applicant. We disagree. Maintaining the accuracy and completeness of ownership and control information for existing permits is critical to making accurate permit eligibility decisions under section 510(c) of the Act.

Several commenters said that the proposed rule would impose a tremendous burden because it would require reporting of changes in surface and mineral owners for the permit and adjacent areas. The commenters asserted that it is unnecessary to notify a regulatory authority of those changes if the persons involved do not control the manner in which mining and reclamation operations are conducted. As noted above, we are not adopting the rule as proposed. Final § 774.12 does not require any reporting of changes in surface or mineral ownership unless that change alters the ownership or control status of the persons involved.

Commenters suggested that we should only require updates of ownership and control information either annually or at the time of mid-term permit review (every two and a half years). We decline to adopt the commenters' suggestions because the recommended update intervals are too infrequent for maintenance of the reasonably accurate and complete database needed to ensure accurate section 510(c) permit eligibility determinations.

One commenter claimed that a permittee may not learn of an ownership change until a long time after it occurs. We believe that permittees will always either be aware of, or be in a position to be aware of, changes in ownership or control at the time that the change occurs.

One commenter opposed categorizing these information updates as permit revisions. The final rule does not classify these updates as permit revisions.

Commenters asked if a permittee's failure to comply with the 60-day reporting requirement would require a notice of violation. Since this rule applies only to permits that have already been issued, failure to comply would subject to the permittee to enforcement action under part 843 of our rules. We have no basis for distinguishing between a failure to comply with this reporting requirement and a failure to comply with any other reporting requirement applicable to permittees, such as water monitoring.

Several commenters requested clarification as to who would be subject to proposed § 774.13(e) and whether proposed § 774.17 would include changes in certified officers and directors. Both the proposed and final rules clearly place the responsibility for submitting the information updates on the permittee. Final § 774.12 requires reporting of all changes in owners and controllers.

A commenter asked under what circumstances and authority regulatory authorities could investigate reported and unreported changes. The commenter said the ability of States to thoroughly investigate multi-State entities is limited and that States would likely have to rely on assistance from the AVS Office.

A regulatory authority may investigate any circumstance, including changes of ownership or control information, at any time the regulatory authority believes the circumstances warrant. The AVS Office has assisted, and will continue to assist, State regulatory authorities with investigations at a variety of levels.

Q. Section 774.17—Transfer, Assignment, or Sale of Permit Rights

We proposed to revise the provisions for the transfer, assignment, or sale of permit rights in § 774.17 to distinguish between those instances when a new permit would be required and those instances requiring only approval of a change to existing permit information. We also proposed to revise the definition of *successor in interest.*

We are not adopting the proposed revisions to § 774.17. Because of the numerous comments we received on the proposed revisions, we decided to further study issues and considerations regarding the transfer, assignment, or sale of permit rights.

R. Section 778.5—Definitions

As proposed, § 778.5 would have included definitions and examples of ownership and control. Instead of creating this new section, we are adopting revised versions of the proposed definitions in final § 701.5. The definitions in the final rule also incorporate revised versions of the proposed examples. See the discussion of ''*own, owner,* or *ownership*'' and ''*control* or *controller*'' in section VI.A. of this preamble.

S. Section 778.10—Information Collection

In this final rule, the section we adopt from proposed § 778.10 is found at § 778.8.

We proposed to revise the information collection burden for part 778. We are redesignating previous § 778.10 as new § 778.8 which contains the information collection requirements for part 778 and the Office of Management and Budget (OMB) clearance number.

In this final rule, § 778.8(a) is revised to show the new OMB clearance number for this part is 1029–0117. The provision under § 778.8(b) is revised to adjust the estimated public reporting burden from 48 hours to 27 hours. The revision is the result of reductions in use and in programmatic changes. The estimate represents the average response time.

Summary of Comments and Adjustments to Burden Estimates

We considered information from the individuals who commented on information collection aspects of the proposed rule. In general, commenters stated that the estimated information collection burden related to the proposed rule was too low. Commenters generally did not mention any specific rule change which was underestimated or any specific number of hours that would alter the OSM estimate.

A commenter stated that the burden hours should be 600 hours, instead of 25 hours, for part 778. We compared the commenter's estimate with other data collected from industry sources and found them too inconsistent to use in the estimate. While we might otherwise be inclined to incorporate an estimate larger than the one published in the proposed rule, we have not in this instance because the discrepancy is so large. As such, the comment was not accepted. Instead, the estimated burden hours in this final rule remain approximately the same as proposed.

T. Section 778.13—Legal Identity and Identification of Interests

The regulations we adopt from proposed § 778.13 are found at §§ 778.9, 778.11, 778.12, and 778.13. We proposed to revise previous § 778.13 to emphasize the importance of full disclosure of ownership and control information.

We originally adopted regulations on this subject in §§ 778.13 and 778.14 of our 1979 rules, which we substantially revised in 1989. See 44 FR 15021 (March 13, 1979) and 54 FR 8982 (March 2, 1989). In *NMA* v. *DOI I*, the U.S. Court of Appeals for the D.C.

Circuit invalidated the 1989 permit information rule, including §§ 778.13 and 778.14, on the narrow grounds that it was centered on the invalidated 1988 ownership or control rule. 105 F.3d at 692, 696. In our 1997 IFR, which we adopted in response to the *NMA* v. *DOI I* decision, we cured the defects noted by the Court and repromulgated §§ 778.13 and 778.14 in a form that contained few other substantive changes from the 1989 rule. See 62 FR 19450, 19453–54 (April 21, 1997).

The National Mining Association challenged the IFR, arguing it was *ultra vires* because it required submission of permit application information not expressly required under sections 507(b) and 510(c) of the Act. The U.S. Court of Appeals upheld the permit information requirements in the IFR, stating:

> This court has already held, however, 'that the Act's explicit listings of information required of permit applicants [in sections 507 and 508] are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act.' *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514 (D.C. Cir.) (en banc), *cert. denied*, 454 U.S. 822, 102 S.Ct. 106, 70 L.Ed.2d 93 (1981). Because section 510 is by its terms no more exhaustive than sections 507 and 508, we conclude the Secretary may require schedule information not specifically listed in any of the cited provisions of the Act.

NMA v. *DOI II*, 177 F.3d 1, 9 (D.C. Cir. 1999).

The information submission requirements in this final rule are similar to the requirements previously upheld by the Court of Appeals. To the extent that the provisions we adopt today correspond to provisions in our previous rules, we continue to rely upon the rationales set forth in the preambles to the prior rulemakings. *See* 44 FR 15021–25 (March 13, 1979); 54 FR 8982–90 (March 2, 1989); 59 FR 54347–49 (October 28, 1994); 62 FR 19452–54 (April 21, 1997).

Summary of Rule Changes

The regulations we are adopting today differ from both the previous and proposed regulations in that the final regulations reflect greater use of plain language principles and clarify that the identity, ownership and control, and permit history information requirements pertinent to a permit applicant or permittee also apply to an operator.

The most significant new provisions of this final rule: (1) Require that the natural person who will have the greatest level of effective control over the entire proposed surface coal mining operation certify as to his or her ability to control the proposed operation; (2) allow applicants to identify the specific portion(s) or aspect(s) of an operation that their owners and controllers own or control; (3) allow an applicant having other active permits to use AVS to provide required permit application information if the applicant certifies that all of the relevant part of the information already in AVS is accurate, complete, and up-to-date; and (4) allow a regulatory authority to establish a central file for permittees with multiple permits to eliminate duplicate information in permit files.

Final § 778.9 Certifying and Updating Existing Permit Application Information

This new section includes two provisions intended to reduce the paperwork and information collection burden on applicants and regulatory authorities. Originally proposed as § 778.13(o), final § 778.9(a) allows permit applicants to (1) certify that existing information in AVS is accurate and complete and (2) include the certification in an application instead of submitting duplicate information separately for each new application. Final § 778.9(c), which we proposed as § 778.13(p), allows regulatory authorities to establish a central file for an applicant instead of keeping duplicate information for each application and permit.

Final § 778.9(b) requires permit applicants to swear or affirm that the information provided in an application is accurate and complete. We are adding this provision in response to comments to emphasize the importance of disclosure of accurate and complete application information.

Final § 778.9(d) consolidates the requirements of previous §§ 778.13(k) and 778.14(d) without making any substantive changes to the previous rules. Section 778.9(d) specifies that, after an application is approved but before a permit is issued, an applicant must update, correct, or indicate that no change has occurred in the information provided under final §§ 778.9 and 778.11 through 778.14. Final §§ 778.11 through 778.14 contain applicant identity, operator identity, ownership and control, permit history, property interest, and violation information requirements.

Final § 778.11 Providing Applicant, Operator, and Ownership and Control Information

We moved those portions of previous and proposed § 778.13 that pertain to the identity of the applicant, operator, owners, controllers, and other persons with a role in the proposed surface coal mining operation to new § 778.11. Except for the changes noted above under the heading ''Summary of Rules Changes'' and the modifications discussed below, final § 778.11 is substantively identical to previous §§ 778.13(a), (b), and (c).

The proposed rule would have replaced the provisions in previous § 778.13 for voluntary submission of social security numbers and mandatory submission of employer identification numbers with a requirement for submission of taxpayer identification numbers. Commenters objected to the proposed requirement as burdensome and challenged its legality. In response, §§ 778.11 and 778.12 of this final rule require taxpayer identification numbers only for permit applicants, permittees, and operators. Thus, this final rule is consistent with 31 U.S.C. 7701(c), which requires that applicants for a Federal permit, recipients of a Federal permit, and persons who owe fees to a Federal agency furnish their taxpayer identification numbers.

Final § 778.11(c)(5) is a new provision that allows an applicant to identify which of its owners or controllers own or control only a portion or aspect of the proposed surface coal mining operation. We made this change because some of an applicant's owners and controllers may have responsibilities only for distinct portions or aspects of an operation. However, if an applicant elects to identify owners and controllers that only own or control a portion or aspect of a proposed operation, the applicant must account for ownership and control of all portions or aspects of the proposed operation in the application. In addition, when an owner or controller ceases to own or control a portion or aspect of an operation, the permittee must update the permit within 60 days of the change to identify the replacement owner or controller. See final § 774.12(c).

Final § 778.11(d) is a new provision. It requires that the natural person with the greatest level of effective control over the entire proposed surface coal mining operation certify, under oath, that he or she controls the proposed operation. Proposed as § 778.13(m), the certification requirement would have extended to all of an applicant's owners and controllers. However, in response to comments and upon further deliberation, the final rule applies the certification requirement only to the natural person with the greatest level of effective control over the entire proposed surface coal mining operation.

We are not adopting the portion of proposed § 778.13(m) that would require owners and controllers to certify that they would be under the

jurisdiction of the Secretary for compliance purposes. A certification of this nature cannot and would not expand jurisdiction beyond the limits already established by the Act and regulatory program. Therefore, it is unnecessary.

We also are not adopting the portion of proposed § 778.13(m) that would have extended the information disclosure requirements of final § 778.11 to ''all other persons who will engage in or carry out surface coal mining operations as an owner or controller on the permit.'' Since final § 778.11(c)(5) already requires disclosure of information concerning persons who own or control either an applicant or an operator, the proposed rule is unnecessary. The definitions of ''*own, owner,* and *ownership*'' and ''*control* or *controller*'' in final § 701.5 will suffice to identify those persons subject to the application information disclosure requirements of § 778.11.

We are also not adopting in part 778 the portion of proposed § 778.13(c)(1)(iii) that would have required, in part, that a permittee submit the date of departure of an owner or controller whenever a cessation order was issued. Proposed § 778.13(c)(1)(iii) was substantively identical to previous § 778.13(c)(3). Instead, the final rule incorporates the requirement for a permittee to provide the date of departure for an owner or controller into new § 774.12(a), which contains information update requirements for permittees.

Final § 778.12 Providing Permit History Information

We are adding new § 778.12 to require the disclosure of the mining and permit history of an applicant, operator, and certain other persons with a role in the proposed surface coal mining operation. Final § 778.12 is substantively identical to previous §§ 778.13(d) through (f), with the exception of the changes previously noted above under the heading ''Summary of Rule Changes'' and the modifications discussed below.

Proposed § 778.13(e) would have required that an applicant provide all names under which the partners or principal shareholders of the applicant and operator operate or previously operated a surface coal mining and reclamation operation in the United States within the five years preceding the date of application. We are adopting a revised version of this proposed rule as final § 778.12(a). To increase consistency with section 507(b)(4) of the Act, 30 U.S.C. 1257(b), we are extending this requirement to the applicant and replacing the term ''surface coal mining and reclamation operation'' with ''surface coal mining operation.'' Like the final rule, the Act applies this requirement to the applicant, and it does not require information concerning reclamation operations. We are extending this requirement to the operator and the operator's partners or principal shareholders for internal consistency with other regulations. Hence, this final rule requires that an applicant must provide all names under which the applicant, the operator, the applicant's partners or principal shareholders, and the operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of the application.

Final § 778.12(a) also differs from previous § 778.13(d) in that, like section 507(b)(4) of the Act, it requires only a list of names under which these persons operate or previously operated a surface coal mining operation. The final rule does not include the permit identification information that the previous rule required. As discussed below, we will require permit identification information only for those surface coal mining operations specified in final § 778.12(c).

Proposed § 778.13(g) would have required detailed permit history information about permits for surface coal mining operations held by the applicant or the operator during the five years preceding the date of the application. The corresponding provisions of previous § 778.13(d) and (f) required detailed permit history information for all surface coal mining operations either: (1) currently owned or controlled by the applicant (previous § 778.13(f)), or (2) currently or previously owned or controlled by the applicant or the applicant's partners or principal shareholders within the five years preceding the date of the application (previous § 778.13(d)). After evaluating the comments received, we are adopting a middle course to ensure that we receive sufficient information to make an informed permit eligibility decision under section 510(c) of the Act while otherwise minimizing information collection burdens on permit applicants. Accordingly, § 778.12(c) of the final rule requires detailed permit history information for all surface coal mining operations that the applicant or operator: (1) currently owns or controls, or (2) owned or controlled during the five-year period preceding the date of application. For the same reason, we also decided to retain the substance of previous § 778.13(f)(2), which the proposed rule would have eliminated. We are codifying this provision as final § 778.12(c)(5). Like previous § 778.13(f)(2), final § 778.12(c)(5) requires that the permit history of each operation include the permittee's and operator's relationship to the operation, including the percentage of ownership and location in the organizational structure.

As we proposed, we are eliminating the requirement in previous § 778.13(f)(1) for submission of the date each MSHA identification number was issued. In our experience, this information has no practical value in implementing SMCRA.

Final § 778.13 Providing Property Interest Information

This section of the final rule requires the disclosure of mineral and surface ownership information for the proposed permit and adjacent areas. Final § 778.13 is derived from proposed §§ 778.13(h) through (k) and is substantively identical to the property interest information requirements in previous §§ 778.13(g) through (j).

Proposed § 778.13(n) Is Not Adopted

Proposed § 778.13(n) would have required that an applicant submit the information required under proposed §§ 778.13 and 778.14 in any format we prescribe. We are not adopting this provision because existing § 777.11(a)(3) already requires an applicant to submit all permit application information in any format that the regulatory authority prescribes. We see no purpose in duplicating this requirement in part 778. We also see no need for a counterpart to previous § 778.13(l), which, to facilitate data entry into AVS, required that an applicant submit the information required under proposed §§ 778.13 and 778.14 in any format that OSM prescribed. Section 773.8 of this final rule adds a new requirement that the regulatory authority enter all application data into AVS. Hence, there is no longer a need for a rule specifying that application information be submitted in an OSM-prescribed format. As the agency responsible for data entry, the regulatory authority should have the flexibility to prescribe whatever format it deems appropriate.

General Comments on Proposed § 778.13

One commenter expressed support for continuing to require disclosure of the persons who own or control an applicant and other information in the permit application process. However, the commenter also expressed concern that the proposed rule weakens

responsibility for providing accurate and complete information. We disagree. Nothing in the proposed rule altered the requirement of previous § 773.15(c)(1), now final § 773.15(a), that an application be complete and accurate. However, to provide additional assurance, we have added § 778.9(b), which requires that applicants swear or affirm that the information in a permit application is accurate and complete. In addition, under part 847 of this final rule, if a regulatory authority determines that an applicant has intentionally omitted information from an application, that person may be prosecuted under section 518(g) of the Act, 30 U.S.C. 1268(g), for knowingly making a false statement or a knowing failure to provide required information. See final § 847.11(a)(3).

A commenter asked whether a contract operator who is also the applicant is subject to information disclosure requirements. All applicants are subject to the same information disclosure requirements under part 778.

One commenter encouraged us to continue to require ''upstream'' information. The final rule does so, partly because section 507(b) of the Act mandates collection of most of this information, and partly because regulatory authorities use this information for other purposes under the Act, including alternative enforcement and future permit eligibility determinations should an owner or controller of a permittee later become an applicant.

Another commenter argued that the information requirements of proposed §§ 778.13 and 778.14 vastly exceed the information Congress authorized the agency to collect in sections 507 and 510(c) of the Act. We acknowledge that our rules require more information than is expressly required under the statutory provisions cited by the commenter. However, under section 201(c)(2) of the Act, we have the authority to adopt ''such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.'' We are not limited to the specific permit application requirements of section 507 and 510(c) of the Act. See *NMA* v. *DOI II*, 177 F.3d at 9. The information required by our final rule will assist us in determining permit eligibility under section 510(c) of the Act, which prohibits issuance of a permit to any person who owns or controls an operation with an outstanding violation. There is no limitation on the scope of that prohibition, even though section 510(c) only requires a schedule of violation notices received during the previous 3 years. We also need the information in our final rule to assist us in evaluating the accuracy and completeness of other permit applications, and, when appropriate, identifying the persons that may be subject to alternative enforcement actions. For example, we need identifying information about persons who own or control the applicant or operator to verify the applicant's statement under section 507(b)(5) of the Act as to ''whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant'' has ever forfeited a mining bond or had a mining permit suspended or revoked within the 5-year period preceding the date of application.

One commenter asserted that the proposed rule disregarded the purposes of the Act's permit application information requirements. We disagree. Section 102(d) of SMCRA states that the purposes of the Act is to ''establish a nationwide program to protect society and the environment from adverse effects of surface coal mining operations.'' Collecting the information needed to implement the permit block sanction of section 510(c) and pursue alternative enforcement is fully consistent with this purpose.

A commenter expressed concern about the liability of a person who prepares or signs an application. Except as specifically provided in § 847.11(a)(3) of this rule or another provision of our existing regulations or the Act, we are not ascribing any form of liability to anyone who prepares or signs an application.

The commenter also expressed concern about the liability of persons erroneously listed in an application as owners or controllers. Any person listed as an owner or controller in an application may challenge that listing under final §§ 773.25, 773.26, and 773.27.

One commenter noted that *NMA* v. *DOI II* (177 F.3d at 5) allows us to consider past ownership and control of operations with violations when determining a pattern of willful violations under section 510(c) of the Act, 30 U.S.C. 1260(c). To facilitate this determination, the commenter suggested that the final rule require submission of information on past ownership or control relationships.

We are not adopting the commenter's suggestion. Under final § 773.8(b) and (c), a regulatory authority must enter and update ownership and control information and violation information provided in permit applications into AVS. We retain this information in AVS as application history and, once a permit is issued, as permit history. Because regulatory authorities have been entering this information for over a decade, the AVS data base, combined with new information submitted in a permit application, should enable a regulatory authority to determine past ownership or control relationships when necessary.

Another commenter suggested that, based on the retroactivity holding in *NMA* v. *DOI II*, we should revise our information disclosure regulations to require applicants to report ownership or control relationships and violations with reference to whether the relationships and violations occurred before or after November 2, 1988, the effective date of the October 3, 1988, ''ownership and control'' rule. We see no need to make the suggested change. Final §§ 778.11(e) and 778.14(c) require that an applicant provide dates associated with ownership or control relationships and violations. AVS contains an historical record of these dates. Hence, regulatory authorities will have the information needed to make permit eligibility determinations using whatever cutoff date applies.

A commenter stated that because *NMA* v. *DOI II* invalidated our previous rule's presumption of ownership or control for officers and directors, we should only require information for presidents, not for other officers and directors. We disagree. Under section 507(b)(1) and (4) of the Act, 30 U.S.C. 1257(b)(1) and (4), each permit application must include information about officers, directors and principal shareholders. In addition, the court's invalidation of the previous presumption does not mean that officers and directors are never owners or controllers. Furthermore, a regulatory authority may need this information to determine ownership or control relationships and eligibility for alternative enforcement actions under parts 843, 846, and 847 of our rules or the State program equivalents.

One commenter stated that the proposed rules improperly confused the terms ''owner'' and ''controller'' with the person carrying out the mining operation. According to the commenter, under the *NMA* v. *DOI* decision, the obligations of these two entities should be kept separate. We disagree. The court did not address this issue. However, as discussed elsewhere in this preamble, we are not adopting proposed § 778.13(b)(5), which would have specifically required information about any person ''who will engage in or carry out surface coal mining operations as an owner or controller on the permit.'' We have also eliminated the ''engage in or

carry out'' terminology from the certification requirements of final § 778.11(d), which we proposed as § 778.13(m). These modifications should eliminate any confusion. The operative principle is whether a person meets the criteria in the ownership and control definitions in § 701.5 of this rule.

Comments on Proposed § 778.13(b)

Numerous commenters objected to the requirement in proposed § 778.13(b) for disclosure of taxpayer identification numbers, especially when that number is a social security number. One commenter stated that the preamble to the proposed rule incorrectly characterized 31 U.S.C. 7701 as providing a basis for this requirement. Several commenters urged us to require that social security numbers be kept confidential, both for privacy reasons and because State regulatory authorities would have a difficult time convincing people to divulge their social security numbers on an application that is open to public inspection and review. Another commenter said the Social Security Administration does not allow social security numbers to be used for this purpose.

We disagree with the commenters' assertions that we lack the authority to require submission of taxpayer identification or social security numbers. The Debt Collection Improvement Act of 1996 revised 31 U.S.C. 7701 to read—

Sec. 7701. Taxpayer Identifying Number

(a) In this section—

* * * * *

(2) ''taxpayer identifying number'' means the identifying number required under section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109).

* * * * *

(c)(1) The head of each Federal agency shall require each person doing business with that agency to furnish to that agency such person's taxpayer identifying number.

(2) For purposes of this subsection, a person shall be considered to be doing business with a Federal agency if the person is—

* * * * *

(B) an applicant for, or recipient of, a Federal license, permit, right-of-way, grant, or benefit payment administered by the agency or insurance administered by the agency;

* * * * *

(D) assessed a fine, fee, royalty or penalty by the agency; * * *

Persons who apply for or receive permits for which we are the regulatory authority lie within the scope of 31 U.S.C. 7701(c)(2)(B) because those permits are Federal permits. Furthermore, under 30 CFR 773.17(g), all SMCRA permittees have an obligation to ensure payment of the Federal reclamation fees required under 30 CFR part 870. Therefore, all permit applicants and permittees under both State and Federal regulatory programs approved under SMCRA lie within the scope of 31 U.S.C. 7701(c)(2)(D). Operators of coal mining operations lie within the scope of 31 U.S.C. 7701(c)(2)(D) because section 402 of SMCRA and 30 CFR part 870 provide that those operators have an obligation to pay Federal reclamation fees. Hence, operators, permit applicants, and permittees for surface coal mining operations under both State and Federal regulatory programs under SMCRA are subject to 31 U.S.C. 7701(c)(1), which requires submission of a taxpayer identifying number. To ensure consistency with 31 U.S.C. 7701(c), we have modified final §§ 778.11 and 778.12 to provide that the application need only include taxpayer identification numbers for permit applicants, permittees, and operators.

The Internal Revenue Code specifies that ''the identifying number of an individual (or his estate) shall be such individual's social security account number.'' 26 U.S.C. 6109(a). See also 26 U.S.C. 6109(d), which restates this requirement. As noted in the preamble of the proposed rule, a taxpayer identification number means an employer identification number for businesses and a social security number for individuals. 63 FR 70605–06, December 21, 1998.

With respect to privacy concerns, we note that, under the previous rules, many individuals voluntarily supplied their social security numbers to regulatory authorities to ensure that they would not be confused with other individuals who have the same name. In addition, when we made on-line access to AVS available to the general public, we modified the system to ensure that only regulatory authorities are able to view social security numbers when accessing AVS via the Internet.

Several commenters requested clarification on how to address ''foreigners who serve as directors of U.S. companies who may not have social security numbers.'' One commenter asked if social security numbers for individual owners or controllers are required if the application includes an employer identification number for the company. As discussed above, the final rule requires taxpayer identification numbers only for the applicant or permittee and the operator, not individual directors, owners, or controllers.

Another commenter stated that the proposed rule confuses operations, which are not legal entities, with the legal entities which conduct them. Specifically, the commenter noted that the entity conducting a mining operation would have a taxpayer identification number, but the operation itself would not. We acknowledge that the wording of both the previous and proposed provisions was ambiguous. The final rule at § 778.12(c)(2) eliminates this ambiguity by clearly specifying that the application must include the taxpayer identification numbers for the permittee and operator.

Comments on Proposed § 778.13(c)

One commenter opposed requiring the same information from both applicants and their owners and controllers. The commenter asserted that identification of the owners and controllers of an applicant is sufficient to determine permit eligibility should the current applicant have an unabated violation. As previously discussed, we use the application information concerning owners and controllers for purposes other than determining permit eligibility under §§ 773.12 through 773.14 of this rule and section 510(c) of the Act.

One commenter suggested that proposed § 778.13(c)(1)(iii) be revised to require that a person's date of departure be included at the time the application is submitted, instead of only when a cessation order is issued. We are not adopting this suggestion because the departure would not have occurred at the time of permit application. However, we are adopting a new provision at § 774.12(c) to require that additions, departures, or changes in the position of any person identified in § 778.11(c) be reported to the appropriate regulatory authority within 60 days of the change. Routine updates, including departure dates, may be reported as soon as a change occurs.

Proposed § 778.13(c)(2) would have limited the information required from publicly traded corporations. One commenter supported the proposed provision. Other commenters opposed any reduction in the information required from publicly held corporations because this information would allow for a more thorough review. After further analysis, we are not adopting the proposed rule because we could not find sufficient support in the Act for differential treatment of publicly traded corporations. Under the final rule, corporate applicants are subject to the same information disclosure requirements regardless of

whether the corporation is privately held or publicly traded.

One commenter noted that the list of persons for whom information must be submitted in a permit application differs from the list of persons in the proposed ownership and control definitions. We did not intend these lists to be identical. Section 507(b)(4) of the Act, 30 U.S.C. 1257(b)(4), requires permit application information concerning certain persons even if they are not owners or controllers under our final definitions of ''*own, owner*, or *ownership*'' and ''*control* or *controller*.''

Another commenter asked why proposed § 778.13(c)(3)(v) required identification of entities that own between 10 and 50 percent of the stock of a corporation since these stockholders are not necessarily owners or controllers. Like the previous and proposed rules, final § 778.11(c)(4) includes this requirement because section 507(b)(4) of SMCRA, 30 U.S.C. 1257(b)(4), mandates the collection of this information.

Numerous commenters said that we should revise proposed § 778.13(c)(3)(v) to limit its scope to persons who directly own the applicant itself, rather than including persons farther upstream, such as a person who owns the owner of the applicant. We are not adopting this suggestion. The ownership information we require under § 778.11(c)(4), the final rule's counterpart to the proposed provision, may be useful, for example, in assessing permit application accuracy and completeness, in identifying persons subject to the permanent permit block sanction under section 510(c) of the Act, or other enforcement actions, and future permit eligibility determinations.

Several commenters suggested that the final rule should include a dilution formula to determine the percentage of ownership for ''upstream'' owners and minimize the information collection burden by restricting reporting requirements to persons who actually own 10 percent or more of the applicant after application of the formula. We asked for input on the dilution formula concept during the public outreach preceding the development of our proposed rule. Since we received little support for this concept, we did not propose a formula. The commenters presented no new arguments in favor of this concept. Therefore, we are not adopting their suggestion. Final § 778.11(c)(4) requires information concerning all persons who own 10 to 50 percent of an applicant. If a person owns an entity, that person also owns all entities owned by the first entity.

One commenter opposed ''any effort to restrict responsibility for owners of operations to [those who have] more than 10 percent ownership.'' Ten percent ownership is the information reporting threshold established by section 507(b)(4) of the Act. However, if a person owning less than 10 percent of an entity is nonetheless a controller of that entity under the definition of ''*control* or *controller*'' in final § 701.5, final § 778.11 requires that an applicant report information pertaining to that person as well.

Comments on Proposed § 778.13(d)

Proposed § 778.13(d) would have provided that an applicant need not report the identity of any corporate owner not licensed to do business in any State or territory of the United States. One commenter expressed support for the proposed provision on the basis that it would eliminate unnecessary information in AVS. The commenter also asked if these entities would be removed from AVS once a final rule is adopted, and if not, would they be considered in permit eligibility determinations. After further analysis, we are not adopting the proposed rule because the Act provides little if any support for excluding this information. In addition, adopting the proposed exclusion would compromise the accuracy and completeness of information in AVS.

Comments on Proposed § 778.13(g)

One commenter expressed support for eliminating the requirement to provide the date of issuance for the MSHA identification number. We are eliminating this requirement as proposed.

Comments on Proposed § 778.13(h) and (i)

Two commenters requested that the timeframes in proposed § 778.13(h) and (i) be extended from 30 to 90 days because of the extensive research needed to document the name and address of each legal or equitable owner of record within and adjacent to the proposed permit area. Since neither the previous regulations nor the proposed rules contained any timeframes for preparation of a permit application, we are not adopting this suggestion.

Comments on Proposed § 778.13(m)

Proposed § 778.13(m) would have required that, before permit approval, the persons who will engage in or carry out surface coal mining operations as owners or controllers of the proposed operation must certify that they have the ability to control the operation and that they are under the jurisdiction of the Secretary for the purposes of compliance with the terms and conditions of the permit and the requirements of the regulatory program.

Numerous commenters opposed this proposal, especially its application to all owners and controllers. In response to these comments, § 778.11(d) of this final rule requires only that the natural person with the greatest level of effective control over the entire proposed surface coal mining operation submit a certification in the application, under oath, that he or she controls the proposed operation. Identifying this person is of greater value than requiring that all owners and controllers certify as to their ability to control the proposed surface coal mining operation. Every surface coal mining operation should have one individual who is responsible for everything that occurs with respect to that operation. We anticipate that this individual normally will be the president of the applicant or a person who holds an equivalent office. However, depending on the circumstances, the individual may be someone else.

Many commenters also opposed proposed § 778.13(m) because it appeared to ascribe personal liability for compliance to the person providing the certification. One commenter expressed concern that the certification would serve as a personal guarantee of the permittee's obligations. The commenter questioned the legal basis for demanding such a guarantee as a prerequisite for permit issuance. Another commenter argued that the certification provision improperly assigned the responsibilities of the applicant or permittee to the owner or controller.

We are not adopting that part of proposed § 778.13(m) that would have required owners and controllers to certify that they were subject to the jurisdiction of the Secretary of the Interior. This portion of the proposed rule was related to proposed § 773.17(j), which would have assigned joint and several liability for compliance to all owners and controllers and made them subject to the Secretary's jurisdiction. However, as discussed elsewhere in this preamble, we decided not to adopt that provision. Therefore, the final rule does not ascribe any personal liability to the person who provides the certification. That person's liability is limited to whatever liability the person already has under other provisions of law or regulation, such as the individual civil penalty provisions of 30 CFR part 846 and corporate and common law governing personal liability for the

applicant's actions or inaction. We acknowledge that certification cannot expand the Secretary's jurisdiction beyond the limits established by the Act.

Several commenters argued that the certification should be required at the time that a violation occurs, rather than at the time of application for a permit. We disagree. A regulatory authority needs this information at the time of application so that it is readily available when a violation occurs. Applicants are generally more willing to identify owners and controllers than are permittees in violation.

One commenter found the certification provision confusing because, according to the commenter, proposed §§ 773.17(i), 773.22, and 773.25 use the terms ''owner'' and ''controller'' in an inconsistent manner and establish three different standards of ownership and control, in addition to the definitions of those terms proposed at § 778.5. We disagree with the commenter's characterization of the proposed rule (and, by extension, this final rule). In § 701.5 of this final rule, we define ''*own, owner,* or *ownership*'' and ''*control* or *controller.*'' These definitions establish the standards for ownership and control that apply throughout relevant portions of the final rule, even as similar definitions of similar terms applied throughout relevant portions of the proposed rule. We find no inconsistencies in the use of these terms in our rules nor do our rules differ in terms of the standards for ownership and control.

Commenters asserted that the final rule must include a provision for decertification to ensure that a certified controller who leaves an operation would not remain subject to the permit block sanction for violations associated with an operation over which he or she no longer has control. We see no need to add the requested provision. Under final § 774.12(c), a permittee must update the permit within 60 days of the date that the person certified under final § 778.11(d) leaves or changes positions. And under final § 774.11(a), the regulatory authority must enter the updated information into AVS within 30 days of the date that the permittee submits it. These provisions should adequately address the situation about which the commenter expressed concern. Further, any owner or controller, including a certifying controller, may use the challenge procedures at final §§ 773.25 through 773.27 to challenge any ownership or control listing or finding which they believe to be in error.

Several commenters expressed concern that certification would lead to penalties for ''honest mistakes, innocent omissions, and possibly even deliberate actions that have absolutely no impact on the environment.'' This comment overlooks the fact that, under the permit eligibility provisions of section 510(c) of the Act, the operative question is whether those mistakes, omissions, or deliberate actions resulted in a violation that has not been abated or corrected or is not in the process of being abated or corrected. The reasons for those violations do not matter in this context.

One commenter stated that there is no need for certification if all officers are deemed controllers. Neither the proposed nor the final rules classify all officers as deemed controllers. Instead, they list officers as an example of persons who may be controllers depending upon the extent to which they direct or influence the operation. See the definition of ''*control* or *controller*'' in § 701.5 of this final rule.

A commenter stated that the certification requirement causes uncertainty ''when linking the applicant to the outstanding violations of its controllers.'' We disagree. This rulemaking is consistent with the *NMA* v. *DOI I* decision in that the unabated or uncorrected violations of the owners and controllers of an applicant in no way obstruct the applicant's ability to obtain a permit. The certification requirement for the natural person with the greatest level of effective control over the entire proposed surface coal mining operation is an application information requirement. It is independent of the determination of permit eligibility for an applicant.

Comments on Proposed § 778.13(o)

Several commenters supported adoption of proposed § 778.13(o), which provided that a permit applicant may certify that information already in AVS is accurate and complete, either in whole or in part, instead of resubmitting the information for each new application. The commenters said the provision would reduce the burden on both the applicant and the regulatory authority. For this reason, we are adopting the proposed provision as final § 778.9(a) in this rule.

One commenter objected to proposed § 778.13(o) on the basis that it shifted the responsibility for submitting accurate and complete information from the applicant to the regulatory authority. We disagree. Both the proposed and final rules clearly provide that the applicant must certify that the information in AVS is accurate and complete.

The same commenter also argued that paper records are needed to facilitate public review. Again, we disagree. The public has access to AVS, so the lack of paper records should not foreclose the opportunity for the public to review electronic records or to obtain printouts of those records.

Another commenter suggested that, in the case of a corporate applicant, one official should be able to certify that AVS information is accurate and complete. The proposed and final rules do not differentiate between corporate and other applicants. In both cases, the rules require that an applicant certify that the information in AVS is accurate and complete. If corporate bylaws allow one official to provide this certification for the corporation, then only that official's certification is required with respect to AVS information.

Comments on Proposed § 778.13(p)

Numerous commenters supported adoption of proposed § 778.13(p), which provided that regulatory authorities may establish a central file to house identity information instead of keeping duplicate information in each application or permit file. We are adopting the proposed provision as final § 778.9 in this rule.

One commenter suggested that the applicant should be responsible for creating a central file and submitting it to the regulatory authority for review and approval. The commenter said that after this approval an applicant would no longer be required to submit the same information with each application. In keeping with the principles of State primacy, both the proposed and final rules allow the regulatory authority to decide whether and how to establish a central file. We do not see any merit in restricting regulatory authority flexibility by mandating a particular method in this final rule. However, creation of a central file does not relieve an applicant of the responsibility, as a part of each application, to either certify that the information in AVS is accurate and complete or update that information as needed, as required by § 778.9(a) of this final rule.

Another commenter expressed concern that State regulatory authorities are not as diligent as the AVS Office when it comes to maintaining the accuracy of the records in their systems. The commenter stated that industry must not be held responsible for information in State files that is not as current as the information in AVS. This comment lies beyond the scope of this rulemaking. In taking actions under this final rule, we will rely upon the most

current and accurate information available.

U. Section 778.14—Violation Information

The regulations we adopt from proposed § 778.14 are found at final § 778.14.

At the beginning of section VI.T. of this preamble, we provide a summary of the history of—and, in part, the rationale for—the provisions described in §§ 778.9, 778.11, 778.12, and 778.13 of this final rule. That discussion also applies to the provisions we are adopting in final § 778.14.

The permit application information requirements at proposed § 778.14 appear in modified form in final § 778.14, with the exception of proposed § 778.14(d), which we are adopting as final § 778.9(d). In general, the final rule differs from both the previous and proposed rules in that this final rule reflects greater use of plain language principles and clarifies that the violation and other information requirements of § 778.14 pertinent to a permit applicant also apply to the operator of a proposed surface coal mining operation.

Changes From Previous § 778.14

In addition to the general changes described above, final § 778.14 differs substantively from previous § 778.14 in the following respects.

• In final § 778.14(a)(2), we are limiting the reporting of past bond forfeitures to those that occurred in the five-year period preceding the date of submission of the application. Section 507(b)(5) of the Act, 30 U.S.C. 1257(b)(5), requires this information only for that period and we see no compelling reason to require data from prior years as part of this rule.

• In final § 778.14(b)(1), we are eliminating the requirement at previous § 778.14(b)(1) to submit dates of permit issuance. Providing the permit number and the name of the regulatory authority that issued the permit is sufficient to identify permits that have been suspended or revoked or for which a bond has been forfeited.

• In final § 778.14(c)(1), as proposed, we are eliminating the requirement for submission of the date an MSHA identification number was issued. We find this information to be of no practical value for SMCRA implementation purposes.

• In final § 778.14(c)(2), we are adding a requirement for submission of the identification number for each violation notice. The previous rule implied this requirement, but, because of the importance of the violation notice identification number for tracking purposes, we decided to include an express requirement in the final rule.

• In final § 778.14(c)(8), we are no longer requiring that applicants submit information about the actions being taken to abate all violations listed under paragraph (c). Instead, we are limiting this requirement to violations not covered by the certification provision of paragraph (c)(7). That paragraph, like previous paragraph (c), allows an applicant to certify that, for violations included in notices of violation issued under § 843.12 or a State program equivalent, the violation is being abated to the satisfaction of the agency with jurisdiction over the violation, provided that the abatement period has not expired. There is no reason to require a description of corrective actions for violations covered by the certification since, in the absence of information to the contrary, the certification alone satisfies the eligibility requirements for a provisionally issued permit, as specified in § 773.14(b) of this final rule.

These changes are necessary or appropriate to improve consistency with the Act or other regulations or to respond to commenters' concerns about both the adequacy and extent of the information required under this section.

With the exception of the items discussed above and in this paragraph, final § 778.14 is identical, in substance, to previous § 778.14. New § 778.9(d) consolidates the procedurally identical requirements of previous § 778.13(k) and § 778.14(d) (proposed as §§ 778.13(l) and 778.14(d), respectively) without making any substantive changes to those provisions. As we also indicate above in section VI.T. of this preamble, final § 778.9(d) specifies that, after an application is approved but before a permit is issued, an applicant must update, correct, or certify that no change has occurred in the information previously submitted under §§ 778.9 and 778.11 through 778.14.

The proposed rule would have eliminated the requirement that an applicant certify that violations are in the process of being abated. We are not adopting the proposed change. Final § 778.14(c)(8) retains the certification requirement because of its utility in determining whether an applicant, may be eligible for a provisionally issued permit under final § 773.14(b).

Comments on Proposed § 778.14

Commenters asserted that we have authority to collect only the information specified in sections 507(b)(5) and 510(c) of the Act, 30 U.S.C. 1257(b)(5) and 30 U.S.C. 1260(c). Specifically, commenters stated that we must limit the scope of § 778.14(c) to include only violations at operations owned or controlled by the permit applicant and then only if the violation notices were received during the three-year period preceding the date of application, since that is the only information that section 510(c) requires. We disagree. As discussed at length in the preamble to the 1989 version of the rule, we have ample authority under other provisions of the Act to adopt these regulations. See 54 FR 8986–87, March 2, 1989. Section 201(c)(2) authorizes the Secretary to ''promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act.'' Section 517(b)(1)(E) requires that a permittee ''provide such other information relative to surface coal mining and reclamation operations as the regulatory authority deems reasonable and necessary.'' In *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 527 (D.C. Cir. 1981), the U.S. Court of Appeals held that the Act's explicit listings of permit information were not exhaustive and did not preclude the Secretary from requiring additional information needed to ensure compliance with the Act. The court held that both sections 201(c)(2) and 501(b) of the Act provide adequate authority for the Secretary to require submission of additional information. The court referenced and reaffirmed that holding in *NMA* v. *DOI II*, 177 F.3d at 9. Because the section 510(c) permit block sanction applies on the basis of all outstanding violations, not just violations incurred during the 3-year period preceding the date of application, we need the additional information we require in § 778.14 to assist in making permit eligibility determinations. We also need this information to evaluate application accuracy and completeness.

A commenter said that proposed § 778.14(c) violates the holding in *NMA* v. *DOI II* by requiring submission of violation information for operations the applicant no longer owns or controls. In this final rule, we are not adopting that part of proposed § 778.14(c) that would have required information concerning outstanding violation notices received for any surface coal mining operation that the applicant owned or controlled. In this final rule, the requirement applies only to unabated or uncorrected violation notices received in connection with surface coal mining and reclamation operations that the applicant or operator owns or controls at the time an application is submitted. However, section 510(c) of SMCRA expressly requires applicants to list all

violation notices received during the three-year period preceding the date of an application. This requirement, which we are adopting as part of final § 778.14(c), must be met regardless of whether the applicant still owns or controls the operations that incurred those violations.

Several commenters argued that the information requirements in §§ 778.14(a) and (b) concerning permit suspensions and revocations and bond forfeitures from persons under common control with the applicant are inconsistent with *NMA* v. *DOI I.* The commenters are mistaken. Nothing in the cited court decision prohibits collection of this information. Section 507(b)(5) of SMCRA, 30 U.S.C. 1257(b)(5), expressly requires submission of ''a brief explanation of the facts involved'' for permit suspensions and revocations and bond forfeitures experienced by ''the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant.'' Our regulations appropriately flesh out this statutory requirement by requiring only the information relevant to identifying the circumstances of a permit suspension, revocation, or bond forfeiture and their bearing on permit eligibility.

Several commenters claimed that the proposed rule was flawed because it failed to address the requirement in section 510(c) of SMCRA to disclose violations of other environmental protection laws relating to air or water quality. Commenters also stated that noncompliance with this requirement is widespread, that inaccurate and incomplete disclosure of this information by applicants is the rule rather than the exception, that we have failed to enforce this provision for the past 22 years, and that we have failed to execute interagency agreements concerning the loading, listing, and cross-referencing of violations of State and Federal air and water laws by surface coal mining operations. The commenters said disclosure of air and water quality violations should be a part of ''other information available to the regulatory authority'' and that OSM and States should investigate the disclosure of this information by permit applicants.

We disagree that the proposed rule did not address these types of violations. Both proposed and final § 778.14(c) require a list of all violation notices received by an applicant during the three-year period preceding submission of an application as well as a list of all unabated or uncorrected violation notices incurred by operations the applicant or its operator own or control as of the date of application. Both our previous regulation (§ 773.5) and this final rule (§ 701.5) define ''violation notice'' as including these types of violations. With respect to enforcement, we acknowledge that we have not been successful in negotiating a formal agreement on a national basis with other agencies such as the Environmental Protection Agency (EPA). However, we do enter air and water quality violations into AVS when we receive this information from appropriate agencies. For example, EPA's Region III, which has responsibility for compliance with the Clean Water Act in the major coal mining States of northern Appalachia, has provided selected violation information to us for the past three years.

The same commenters suggested that we define the phrase ''other information available'' as used in section 510(c) of the Act to include any violations of air or water quality laws related to mining operations owned or controlled by the applicant. The commenters also stated that regulatory authorities should contact Federal and State agencies in other States to determine compliance with air and water quality laws; that we should require State regulatory authorities to maintain data in AVS of all violations of air or water quality laws related to mining operations; that we should maintain a current database in AVS for violations incurred under Federally approved State air and water quality programs; and that each permitting agency should be required to withhold permit issuance pending a demonstration of compliance with air and water quality protection requirements, as required under section 510(c) of the Act.

To the extent that reliable information readily available to the regulatory authority indicates that the applicant is in violation of air or water quality requirements, we agree that section 510(c) of the Act requires that the permit be withheld. However, this obligation is limited to violations meeting our definition of violation in § 701.5 of this rule; i.e., the agency with jurisdiction over air or water quality must have provided the offending party with written notification of the failure to comply. This limitation is consistent with the reference in section 510(c) to ''notices of violation * * * incurred by the applicant.'' Section 510(c) requires use of both the violation schedule submitted with the application and ''other information available to the regulatory authority'' to determine permit eligibility. We decline to adopt the commenters' suggestions regarding application of the ''other information available'' phrase because we do interpret that phrase as requiring only that regulatory authorities use all reliable information readily available to them in a useable form. It does not mean that they must actively seek out all potential sources of information concerning air and water quality violations. Furthermore, we have no control over the availability of air and water quality violation information, which, in our experience, other agencies may be reluctant to provide, either at all or in the form and detail needed for accurate permit eligibility determinations under section 510(c). As discussed above, although we have not been successful in negotiating national agreements for AVS data entry, we do have an arrangement with EPA Region III whereby we enter air and water quality violation information into AVS when EPA determines that it is appropriate to do so. States are free to negotiate separate information exchange agreements with other agencies, and we encourage them to do so.

In any case, under section 510(c) of the Act and this final rule, the applicant has the responsibility to include all violations of air or water quality laws and regulations in the violation schedule submitted with the application. The regulatory authority must consider the information in the schedule when making permit eligibility determinations.

Several commenters expressed support for the proposed elimination of the provision in § 778.14(c) that requires the applicant to certify that any violation in a notice of violation for which the abatement period has not expired is being corrected to the satisfaction of the agency with jurisdiction over the violation. Upon further analysis, we decided to retain the certification requirement, which appears in § 778.14(c)(8) of this final rule. In the absence of evidence to the contrary, an applicant's certification that a violation is being abated satisfies the requirement of section 510(c) that an applicant submit proof that a violation ''has been or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation.'' Hence, certification is a useful tool in determining whether an applicant may be eligible for a provisionally issued permit under final § 773.14(b).

A commenter suggested that violation information required from applicants should also include all outstanding violation notices for any entity who owns or controls the applicant and who

is owned or controlled by the applicant or its owners and controllers. The commenter stated that, while some of this information cannot be used to determine permit eligibility, it could be used for other enforcement purposes. We decline to adopt the commenter's suggestion. Our final rule closely resembles the information requirements of sections 507(b)(5) and 510(c) of the Act, 30 U.S.C. 1257(b)(5) and 1260(c), respectively, with the addition of a requirement to provide information concerning all unabated or uncorrected violation notices received in connection with any operation that the applicant or its operator owns or controls. The latter information is the most relevant for determining permit eligibility under section 510(c) of the Act. We do not believe that there is sufficient justification for requiring the additional information sought by the commenter simply because it might be useful for unspecified ''other enforcement purposes.''

Several commenters said that the controller of a violation should mean the person who did not abate the violation, not the person who created it. We disagree. The person who caused, or was initially cited for, the violation and any persons who subsequently had the authority to correct the violation are collectively responsible for abating or correcting the violation, unless otherwise provided for by the Act, its implementing regulations, or established principles of business law.

Several commenters asserted that the language in proposed § 778.14(c) is not consistent with section 507(b)(5) of SMCRA. The primary statutory authority for the previous, proposed and final versions of § 778.14(c) is a combination of sections 201(c)(2) and 510(c) of the Act. Section 507(b)(5) of the Act is the primary statutory basis only for paragraphs (a) and (b) of § 778.14.

A few commenters suggested that listing cessation orders should be required, since a cessation order suspends all or part of the operation of the permit. Both proposed and final § 778.14(c) require the reporting of all violation notices, which we define in § 701.5 as including cessation orders.

Some commenters asserted that the rule should require reporting of violation notices received by entities in common control with the applicant. We disagree. The ''under common control'' provision applies only to information requirements under section 507(b)(5) of the Act, 30 U.S.C. 1257(b)(5). Since section 507(b)(5) does not require reporting of violation notices received by the persons to whom it applies, the corresponding regulations in final §§ 778.14(a) and (b) also do not include this requirement.

The same commenters asserted that the information required in § 778.14 should include both abated and unabated violations. Final § 778.14(c) requires a list of all violation notices, both abated and unabated, that an applicant or operator received within the three-year period preceding the date of application. We based this requirement on section 510(c) of the Act, which includes a similar provision regarding the applicant. To meet this requirement, an applicant must disclose the abated and unabated violations which it and its operator received in the three-year period preceding the date of an application.

V. Section 842.11—Federal Inspections and Monitoring

We are not adopting proposed § 842.11.

We originally proposed to revise 30 CFR 842.11(e)(3)(i) because we believed the provision was inconsistent with the D.C. Circuit's decision in *NMA* v. *DOI I.* However, a closer examination found no inconsistency. The existing rule does not preclude applicants from receiving permits based on the violations of their owners or controllers. Rather, it precludes owners and controllers, when they apply for a permit of their own, from receiving that permit if there are unabated or uncorrected violations at operations they own or control.

A commenter suggested that we should make a corresponding change to a similar provision in 30 CFR 840.11(g)(3)(i), which applies to States. (Part 842 governs only Federal inspections and monitoring.) This suggestion is now moot since we are not adopting the proposed rule.

W. Section 843.5—Definitions

We proposed to remove § 843.5 from our regulations. Section 843.5 contained two definitions, *unwarranted failure to comply* and *willful violation.* We proposed to move the definition of *unwarranted failure to comply* from § 843.5 to § 846.5. In addition, we proposed to remove the definition of *willful violation* from §§ 843.5 and 701.5 because we found the definition of *willful violation* to be unnecessary in light of our proposed definition of ''*willful* or *willfully.*''

We received no comments on the proposed removal of § 843.5. However, since the final rule uses the term *unwarranted failure to comply* only in § 843.13, there is no longer any need to move the definition of *unwarranted failure to comply* from § 843.5. As a result, the final rule retains both § 843.5 and the existing definition of *unwarranted failure to comply.*

As proposed, we are removing the definition of *willful violation* from §§ 843.5 and 701.5 because it is no longer necessary in light of our newly adopted definition of ''*willful* or *willfully*'' in § 701.5. Under the final rule, a ''willful violation'' will be an act or omission that meets the definitions of ''willful or willfully'' and *violation* in § 701.5. Section VI.A. of this preamble discusses the comments that we received on the removal of *willful violation.*

X. Section 843.11—Cessation Orders

Previous 30 CFR 843.11(g) required that, within 60 days of issuance of a cessation order, we notify all persons identified as owners or controllers under other specified provisions of our rules. We proposed to revise that rule to make the cross-references consistent with proposed §§ 773.17 and 778.13 and to remove the requirement to notify the persons involved that they had been identified as an owner or controller. Under the proposed rule, we would be required only to notify them that a cessation order had been issued. We received no comments on this proposed rule.

We are adopting the proposed rule in revised form. Final § 843.11(g) provides that, within 60 days after issuing a cessation order, we will notify the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation. The final rule replaces the previous and proposed cross-references concerning identification of owners or controllers with a cross-reference to the ownership and control definitions in final § 701.5. We are making this change because the cross-references in the previous and proposed rules included only persons identified as owners or controllers by the permittee. However, the rules that we are adopting today establish procedures by which the regulatory authority also may identify and list persons as owners or controllers. See final § 774.11(f). Therefore, for consistency with that rule, we are replacing the previous and proposed cross-references with a requirement to notify all persons who are identified as owners or controllers, regardless of whether they were listed by an applicant in an application, subsequently disclosed by the permittee, or identified by the regulatory authority as an owner or controller of the applicant or permittee.

Y. Section 843.21—Procedures for Improvidently Issued State Permits

Background

We proposed minor amendments to paragraphs (d) and (e) of 30 CFR 843.21, which sets forth our procedures for taking Federal enforcement action concerning improvidently issued State permits. Although we did not propose any substantive changes to paragraphs (a), (b), (c), and (f) of the previous rule, we included them in the proposed rule to provide opportunity for public comment on the complete process. *See* 63 FR 70580, 70608.

After the proposal was published, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *NMA* v. *DOI II.* In that decision, the court upheld our ability to take remedial action relative to improvidently issued State permits, but found that our previous regulations ''impinge on the ''primacy'' afforded states under SMCRA insofar as they authorize OSM to take remedial action against operators holding valid state mining permits without complying with the procedural requirements set out in section 521(a) of SMCRA, 30 U.S.C. § 1271(a).'' *NMA* v. *DOI II,* 177 F.3d at 9. Specifically, the court ruled that, absent imminent danger or harm under section 521(a)(2) of SMCRA, we must use the ''specific procedures in section 521(a)(3) of SMCRA'' when we seek ''to revoke a permit issued by the state under its state plan.'' *Id.* at 9–10. We modified the proposed rule to conform to the court's decision.

Section 521(a)(3) of the Act requires the Secretary to take enforcement action if, on the basis of a Federal inspection, ''the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act.'' When taking enforcement action under this section, the Secretary must issue a notice of violation to the permittee or the permittee's agent fixing a reasonable time for abatement of the violation and provide opportunity for a public hearing. Section 521(a)(3) further provides for issuance of a cessation order if the permittee fails to abate the violation within the time originally fixed or subsequently extended.

Because section 521(a)(3) specifies that we may only take enforcement action on the basis of a Federal inspection, one commenter argued that the final rule also must be consistent with section 521(a)(1) of the Act, which establishes the conditions under which we may conduct a Federal inspection in a State with primacy. We agree. Therefore, we have revised the rule to adopt the commenter's recommendation, with the modifications needed to adapt those requirements and procedures to situations that involve improvidently issued permits.

Section 521(a)(1) of SMCRA provides that when the Secretary, on the basis of any information available to him, including receipt of information from any person, has reason to believe that any person is in violation of any requirement of the Act or any permit condition required by the Act, the Secretary must notify the State regulatory authority in the State in which the violation exists and provide the State ten days to take appropriate action to cause the violation to be corrected or to show good cause for not taking appropriate action. If the State fails to take appropriate action or show good cause within ten days, the Secretary must immediately order a Federal inspection unless the information available to the Secretary is a result of a previous Federal inspection. When a Federal inspection under section 521(a)(1) results from information provided to the Secretary by any person, the Secretary must notify the person when the inspection will take place and allow the person to accompany the inspector during the inspection.

Our final rule includes inspection provisions and procedures analogous to those in section 521(a)(1) of the Act and enforcement provisions and procedures analogous to those in section 521(a)(3) of the Act. Final § 843.21(a) requires that we provide the State regulatory authority with a ten-day notice when we have reason to believe that a State permit has been improvidently issued. Final § 843.21(b) clarifies the conditions under which we will consider a State response to a ten-day notice appropriate. Final § 843.21(c) requires that we notify the State and the permittee if we determine that a State response is not appropriate and that a Federal inspection is thus necessary. Final § 843.21(d) requires that we conduct a Federal inspection when a State response is not appropriate. It also requires that, on the basis of that inspection and other available information, we make a written finding as to whether the permit was improvidently issued. Final § 843.21(e)(1) requires that we issue a notice of violation if we find that the permit has been improvidently issued. Final § 843.21(e)(2) requires that we issue a cessation order if the notice of violation is not abated in a timely fashion. In both cases we must provide opportunity for a public hearing on the notice or order. Final § 843.21(f) sets forth the circumstances under which we may terminate or vacate a notice of violation or cessation order.

Final Paragraph (a): Initial Notice

Under final § 843.21(a)(1), we will issue an initial notice to the State regulatory authority, if, on the basis of any information available to us, including information submitted by any person, we have reason to believe a State-issued permit was improvidently issued, and the State has failed to take appropriate action. The initial notice will state in writing the reasons for our belief that the permit was improvidently issued and will request the State to take appropriate action under paragraph (b) of the final rule within 10 days. We will serve the notice on the State regulatory authority, the permittee, and any person providing information under paragraph (a). In response to comments advocating greater public notice and participation, we added paragraph (a)(2) to the final rule. Under that paragraph, we will also provide notice to the public by posting the initial notice at our office closest to the permit area and on the AVS Office Internet home page.

Final Paragraph (b): State Response

Final § 843.21(b) requires a State to respond to an initial notice under paragraph (a) within 10 days and to demonstrate in writing that: (1) the permit was not improvidently issued under § 773.21 or the State regulatory program equivalent; (2) the State is in compliance with the State regulatory program equivalents of final §§ 773.21 through 773.23; or (3) the State has good cause for not complying with the State regulatory program equivalents of §§ 773.21 through 773.23. Under final paragraph (b)(2), the State need not have completed action to suspend or rescind an improvidently issued permit as long as the State has initiated and is pursuing proceedings consistent with §§ 773.21 through 773.23.

''Good cause'' under final paragraph (b)(3) does not include the lack of State program equivalents of §§ 773.21 through 773.23. A State without counterpart regulations retains implied authority to take remedial action on an improvidently issued State permit because of its express authority to deny permits in the first instance. See, *e.g., NMA* v. *DOI II,* 177 F.3d at 9. Hence, this rule properly allows OSM to take remedial action when a State regulatory authority does not take action with respect to an improvidently issued State permit.

Paragraph (c): Notice of Federal Inspection

Under final § 843.21(c), if we find that the State has failed to make the demonstration required under paragraph (b), we must initiate a Federal inspection under paragraph (d) to determine if the permit was improvidently issued under the criteria of § 773.21 or the State regulatory program equivalent. We also must: (1) Issue a notice to the State regulatory authority and the permittee stating in writing the reasons for our finding and stating our intention to initiate a Federal inspection; (2) notify any person who provided information under paragraph (a) that leads to a Federal inspection that he or she may accompany the inspector on any inspection of the minesite; and (3) post the notice at our office closest to the permit area and on the AVS Office Internet home page.

Paragraph (d): Federal Inspection and Written Finding

Under final § 843.21(d), no less than 10 days and no more than 30 days after providing notice under paragraph (c), we will conduct an inspection and make a written finding as to whether the State permit was improvidently issued. In making that finding, we will evaluate all available information, including information submitted by the State, the permittee, or any other person. The timeframes in this paragraph are intended to allow for submission and receipt of information in response to the notice provided under paragraph (c) and investigation of complex ownership and control relationships while still ensuring that inspections and findings are made in a reasonably prompt fashion. The Federal inspection required under this paragraph will not always involve an on-the-ground inspection of either the permit at issue or the minesite with which the violation is associated because some violations, such as unpaid reclamation fees or civil penalties, do not constitute on-the-ground violations. Thus, in many instances, the inspection will consist of an examination of ownership or control relationships and review of relevant records, files, papers and the like.

To ensure that the public has the opportunity to review the finding, paragraph (d) of the final rule requires that we post the finding at our office closest to the permit area and on the AVS Office Internet home page. In addition, if we find that the permit was improvidently issued, the rule requires that we issue a notice to the State and the permittee stating in writing the reasons for our finding.

Final Paragraph (e): Federal Enforcement

If we find that a State permit was improvidently issued under paragraph (d), we must initiate Federal enforcement under paragraph (e). Under final § 843.21(e)(1), we must issue a notice of violation (NOV) to the permittee or the permittee's agent consistent with § 843.12(b), which contains format and content requirements for Federal notices of violation. Among other things, the notice must be in writing and must specify a reasonable time for abatement. Final § 843.21(e)(1) also provides opportunity for a public hearing under existing §§ 843.15 and 843.16 upon issuance of an NOV.

If an NOV is not remedied within the abatement period, final § 843.21(e)(2) requires us to issue a cessation order (CO) consistent with § 843.11(c), which contains format and content requirements for cessation orders. Among other things, under that rule, the order must be in writing and must specify the nature of the condition, practice or violation that resulted in issuance of the order. Final § 843.21(e)(2) also provides opportunity for a public hearing under §§ 843.15 and 843.16 upon issuance of a CO. In addition, 43 CFR 4.1160, *et seq.*, allows a permittee or any person having an interest which is or may be adversely affected by a notice of violation or cessation order issued under authority of section 521(a)(3) to seek review of the notice and order, including a public hearing.

The previous rule required only that we take unspecified ''appropriate remedial action,'' which, the rule stated, could include issuance of an NOV ceasing mining by a specified date. However, in *NMA* v. *DOI II,* the court held that our remedial action must be consistent with section 521(a)(3) of the Act. Therefore, like that section of the Act, the final rule requires issuance of an NOV, followed by issuance of a failure-to-abate CO if the NOV is not abated in a timely fashion.

Final Paragraph (f): Remedies to Notice of Violation or Cessation Order

Final paragraph (f) establishes conditions under which we may vacate or terminate an NOV or CO issued under paragraph (e). Except as discussed below, it is substantively identical to previous 30 CFR 843.21(e), although we have modified some of the language and terminology for consistency with plain language principles and other provisions of this final rule. There are two significant changes from the previous rule. First, since final § 843.21(e) now provides for the issuance of failure-to-abate cessation orders as well as notices of violation, final § 843.21(f) applies to those orders, not just to NOVs as in the previous rule. Second, we have added paragraph (f)(2)(v) and modified paragraph (f)(2)(iii) for consistency with the new eligibility standards for provisionally issued permits under final § 773.14(b).

Final Paragraph (g): No Civil Penalty

Final paragraph (g) is substantively identical to previous 30 CFR 843.21(f).

Provisions of Proposed Rule That We Did Not Adopt

We did not adopt the provisions of proposed §§ 843.21(d)(3) and (e)(2) pertaining to the submission of accurate and complete information. Under the proposed rule, we intended to allow failure to submit accurate and complete information at the time of application for a permit to form the basis for a finding that a permit was improvidently issued (and the subsequent issuance of an NOV), if disclosure of the information would have made the applicant ineligible to receive a permit.

However, upon further review, we determined that we have insufficient basis to classify the failure to supply permit application information as a violation in the absence of any underlying outstanding enforcement action concerning the failure to submit that information. Therefore, we are not adopting the proposed revisions.

Disposition of Comments

Several commenters said that proposed § 843.21(d)(3) was unnecessary. That provision described instances when we would not take remedial action relative to an improvidently issued State permit. Under the proposal, we would not take remedial action if: (1) Any violation, penalty, or fee was abated or paid; (2) an abatement plan or payment schedule was entered into; (3) all inaccurate or incomplete information questions were resolved; or (4) the permittee and the operator, and all operations owned or controlled by the permittee and the operator, were no longer responsible for the violation, penalty, fee, or information. See proposed §§ 843.21(d)(3)(i) through (iv). The commenters objected to our failure to state in the preamble why remedial action would not be taken under the four conditions specified in proposed § 843.21(d)(3)(i) through (iv). They also stated that the conditions ''open the door for delaying and negotiating compliance'' and appear to violate ''the

Act's requirement that enforcement action be taken immediately on all violations, regardless of whether the operator violated the rules on environmental standards, ownership or control information, or bonding.''

After considering these comments, we are not adopting the proposed rules to which the commenters object. Under the final rule, if a State fails to adequately respond to our initial notice within ten days, we must initiate a Federal inspection. If we ultimately find that the permit was improvidently issued, we must undertake Federal enforcement under final § 843.21(e), including the issuance of an NOV and, when appropriate, a failure-to-abate CO. However, under final § 843.21(f)(2), we will terminate an NOV or CO if: (1) The violation has been abated or corrected; (2) the permittee or the operator no longer owns or controls the relevant operation; (3) the violation is the subject of a good faith administrative or judicial appeal; (4) the violation is the subject of an abatement plan or payment schedule; or (5) the permittee is pursuing a good faith challenge or appeal of relevant ownership or control listings or findings. Also, under final § 843.21(f)(1), we will vacate an NOV or CO if it resulted from an erroneous conclusion under § 843.21. Termination or vacation of an NOV or CO under these circumstances is appropriate because, even if the underlying violation remains uncorrected, the permittee would no longer be ineligible to receive a permit under section 510(c) of the Act.

A commenter noted that proposed §§ 843.21(d)(3)(iv) and (e)(2)(iii) both contain the phrase ''no longer responsible for the violation.'' The commenter asked how an entity can be responsible for a violation at a particular point in time and later be relieved of responsibility. The commenter suggested that an entity, and its owners and controllers at the time the violation occurred, continue to be held responsible until the violation is abated without regard to who may later own or control the entity.

As explained above, we did not adopt the provision proposed at § 843.21(d)(3)(iv). However, we adopted a similar provision at final paragraph (f)(2)(ii), which is substantively identical to the corresponding provision in previous § 843.21(d). Final § 843.21(f)(2)(ii) is consistent with both *NMA* v. *DOI II* and our longstanding practice. See, *e.g.,* 54 FR 18438, 18456–57 (April 28, 1989). Under *NMA* v. *DOI II,* we may no longer deny a permit based on past ownership or control of an operation with an unabated violation. Therefore, when a permittee severs an ownership or control relationship and thus becomes eligible to receive a new permit, it would be incongruous to cease operations on an existing permit only to issue a new one to the same permittee for the same operation upon reapplication. Therefore, under final § 843.21(f)(2)(ii), if a person no longer owns or controls the relevant operation with a violation and is not directly responsible for the violation, we will terminate an NOV or CO issued under final § 843.21(e).

With reference to proposed § 843.21(e), the same commenter asked if a violation should be vacated rather than terminated if an operator can demonstrate a lack of current responsibility for a violation, penalty, or fee. In this final rule, as in the proposal, we continue our long-held distinction between vacation and termination. Under final § 843.21(f)(1), we will vacate an NOV or CO if we cited the violation in error. Technically, a vacated violation never existed. Under final § 843.21(f)(2), we will terminate an NOV or CO whenever one of the circumstances in (f)(2)(i) through (v) exists. In other words, we will terminate an NOV or CO issued under § 843.21(e) when the permittee is once again eligible to receive a permit under 30 CFR 773.12 or 773.14 and section 510(c) of the Act.

Two commenters said the word ''may'' in proposed § 843.21(d)(2) should be changed to ''shall'' to clarify that enforcement action is mandatory. Final § 843.21(e) provides that we must take enforcement action if we find that a permit was improvidently issued under final paragraph (d).

A commenter said that our remedial actions should not be limited to issuance of an NOV that ceases mining. Proposed § 843.21(d)(2) would not have done so. However, final § 843.21(e) clarifies that our remedial actions under this section are indeed limited to the issuance of an NOV and, as appropriate, a failure-to-abate CO. In *NMA* v. *DOI II,* the court held that our authority to take remedial action on improvidently issued State permits derives from section 521(a)(3) of SMCRA. That paragraph of the Act authorizes only the two types of enforcement actions identified in our final rule.

A commenter said that the proposed amendments to § 843.21 violate section 521 of SMCRA because operating under an improvidently issued permit is a violation of the Act. The commenter asserted that SMCRA ''allows but one response by a State to a finding that a permit was unlawfully issued—the commencement of an enforcement action under section 521 of [SMCRA].''

SMCRA does not mention improvidently issued permits. However, in *NMA* v. *DOI II*, the court upheld our authority to take enforcement action on improvidently issued State permits provided we adhere to the requirements of section 521(a)(3) of the Act. The final rule is fully consistent with that section of the Act. If a State fails to adequately respond to a ten-day notice issued under final § 843.21(a), and if we subsequently find under final § 843.21(d) that a State permit was improvidently issued, we will take the appropriate enforcement actions under final § 843.21(e).

A commenter expressed disappointment that the proposed regulations would allow us to issue notices of violation whenever we disagree with a State's response to a ten-day notice. The commenter said the provision was unnecessary because the States have demonstrated an ability to properly administer their programs and determine what permittees need to do to achieve compliance. We concur that, in general, States have administered their programs in a responsible manner. However, that fact does not mean that we should not have a remedy for the occasional aberration or a future lapse in State performance.

The commenter also said that § 843.21, along with §§ 773.20 and 773.21, ''conflict with specific terms of the Act's carefully defined enforcement structure, with fundamental notions of due process and finality, with Congress' provision for State primacy in the regulation of surface coal mining and reclamation, and with the law disfavoring retroactive regulations.'' In substance, this commenter questioned our authority to take enforcement actions concerning improvidently issued State permits.

In *NMA* v. *DOI II*, the U.S. Court of Appeals expressly upheld our authority to take remedial action for improvidently issued State permits under the express authority of section 201 of the Act, as long as we do so in accordance with the specific procedures of section 521. *Id.* at 9–10. This final rule fully complies with that decision.

Z. Section 843.24—Oversight of State Permitting Decisions With Respect to Ownership or Control or the Status of Violations

We proposed to remove previous § 843.24 from our regulations. Previous § 843.24 provided for the oversight of State permitting decisions with respect to ownership or control or the status of violations. In this final rule, we are removing previous § 843.24.

A commenter said the absence of previous § 843.24 would result in oversight teams needing more guidance on ownership and control issues. Another commenter said that OSM cannot rely upon § 843.21 to satisfy the oversight obligations under previous § 843.24(b).

We determined that final § 843.21, coupled with general oversight procedures, are sufficient to allow us to satisfy our oversight obligations with regard to improvidently issued State permits. Performance agreements between OSM and State regulatory authorities will address any concerns in the actual oversight procedures. The comments on this section did not persuade us to change our proposal to remove § 843.24 from our regulations.

AA. Part 846—Alternative Enforcement

The provisions we adopt from proposed part 846 are found in final part 847.

We proposed to revise part 846 by adding provisions to provide regulatory codification of certain statutory enforcement provisions that we refer to as alternative enforcement actions.

In this final rule, we are not adopting part 846 as it was proposed. Instead, we will retain the existing provisions in 30 CFR 843.13 for the suspension or revocation of permits for a pattern of violations and the existing provisions in part 846 for individual civil penalties. In addition, we are adopting part 847 to provide for criminal penalties and civil actions for relief under the authority of sections 518(e), 518(f), and 521(c) of Act, 30 U.S.C. 1268(e) and (f) and 1271(c). The final provisions largely track the statutory provisions they implement. We will take these actions when primary enforcement mechanisms do not result in the abatement of a violation.

Final § 847.1 states that part 847 governs the use of measures provided in sections 518(e), 518(g), and 521(c) of the Act for criminal penalties and civil actions to compel compliance with provisions of the Act.

Final § 847.2 provides that: (1) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we will update AVS to reflect the judgment or conviction; (2) the existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted; (3) each State regulatory program must contain provisions for civil actions and criminal penalties that are no less stringent than those in part 847 and include the same or similar procedural requirements; and (4) nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

The provision concerning performance bonds and bond forfeitures is derived from proposed § 773.22(d). A commenter objected to that proposed rule, which would have provided, in part, that the existence of a performance bond cannot be used as the sole basis for a regulatory authority's determination that alternative enforcement action is not warranted. The commenter asserted that in some situations, the existence of the bond is, in fact, the sole basis for determining that alternative enforcement action is not warranted and that OSM should be sensitive to actual practice and procedure at the State level. We disagree. Bond forfeiture is not an enforcement action. In addition, bond forfeiture proceeds may be insufficient to reclaim the site or correct all violations. In these situations, the alternative enforcement actions described in part 847 may assist in achieving complete reclamation and full compliance.

Final § 847.11 implements the criminal penalty provisions of sections 518(e) and 518(g) of the Act. It provides that a regulatory authority will request pursuit of criminal penalties under sections 518(e) and 518(g) of the Act against any person who: (1) Willfully and knowingly violates a permit condition; (2) willfully and knowingly fails or refuses to comply with any order issued under section 521 or 526 of the Act, or any order incorporated into a final decision issued by the Secretary, except for those specifically excluded under section 518(e) of the Act; or (3) knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act. In final § 847.11(a), we modified proposed § 846.11(a) to more closely track sections 518(e) and 518(g) of the Act. We are not adopting proposed § 846.11(c), which merely reiterated the penalties specified in sections 518(e) and (g) of the Act, 30 U.S.C. 1268(e) and (g), and is thus unnecessary since final § 847.11 already contains a reference to those provisions of the Act.

Final § 847.16 implements the civil action provisions at section 521(c) of the Act. Final § 847.16(a) requires that, under section 521(c) of the Act, 30 U.S.C. 1271(c), the regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee meets the criteria specified in final §§ 847.16(a)(1) through (a)(6). Final § 847.16(a) is derived from proposed § 846.16(a).

Final § 847.16(a)(1) requires that a regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee violates or fails or refuses to comply with any order or decision issued by the regulatory authority. Final § 847.11(a)(1) is derived from proposed § 846.16(a)(1)(i).

Final § 847.16(a)(2) requires that a regulatory authority request the Attorney General to institute a civil action for relief whenever a permittee or an agent of the permittee interferes with, hinders, or delays the regulatory authority in carrying out the provisions of the Act or its implementing regulations. Final § 847.16(a)(2) is derived from proposed § 846.16(a)(1)(ii).

Final § 847.16(a)(3) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to admit the regulatory authority's authorized representative onto the site of a surface coal mining and reclamation operation. Final § 847.16(a)(3) is derived from proposed § 846.16(a)(1)(iii).

Final § 847.16(a)(4) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to allow authorized representatives to inspect a surface coal mining and reclamation operation. Final § 847.16(a)(4) is derived from proposed § 846.16(a)(1)(iv).

Final § 847.16(a)(5) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to furnish any information or report that the regulatory authority requests under the Act or regulatory program. Final § 847.16(a)(5) is derived from proposed § 846.16(a)(1)(v).

Final § 847.16(a)(6) requires that a regulatory authority request the Attorney General to institute civil action for relief whenever a permittee or an agent of the permittee refuses to allow access to, or copying of, those records that the regulatory authority determine necessary to carry out the provisions of the Act and its implementing regulations. Final § 847.16(a)(6) is derived from proposed § 846.16(a)(1)(vi).

Final § 847.16(b) provides that a civil action for relief includes a permanent or

temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which a permittee has its principal office. Final § 847.16(b) is derived from proposed § 846.16(a)(2).

Final § 847.16(c) provides that temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended. Final § 847.16(c) is derived from proposed § 846.16(b).

Final § 847.16(d) provides that any relief the court grants to enforce an order under final § 847.16(b) will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting such relief sets aside or modifies the order. Final § 847.16(d) is derived from proposed § 846.16(c).

General Comments on Proposed Part 846

A commenter said that, as recently as 1988, OSM expressly disavowed any connection between the ownership and control provisions in section 510(c) of the Act and the Act's enforcement provisions. The commenter said that in the 1988 individual civil penalty rule, the agency stated that the ownership or control rule does not inform the scope or circumstances of liability for a corporate officer, director, or agent under SMCRA. The commenter further claimed that the proposed rule imposes a responsibility on officers, directors, or agents to know all the facts arising in day-to-day operations.

This final rule does not purport any connection between the permit eligibility provision in section 510(c) of SMCRA and any enforcement provision, including those we call alternative enforcement. While an individual may incur a personal liability or sanction under the enforcement provisions in sections 518 and 521 of the Act, the permit eligibility requirement under section 510(c), and our definitions of ownership and control, do not impose any such personal liability. Further, this final rule does not impose any responsibility on any individual to know all of the facts arising from day-to-day operations. However, as we said in the 1988 individual civil penalty rule, any individual should exercise reasonable care in his or her position to acquire knowledge of the functions attendant to his or her position. 53 FR 3666 (February 8, 1988).

Several commenters asked us to clarify when alternative enforcement action is not warranted. Sections 847.11 and 847.16 of the final rule identify those circumstances under which the regulatory authority must seek criminal penalties or civil actions for relief. Otherwise, the regulatory authority must make a determination on a case-specific basis.

A commenter asserted that the language in the Act for criminal sanctions and civil actions for relief is sufficient without repeating the provisions in the regulations. We do not agree. Final §§ 847.11 and 847.16 flesh out the statutory requirements. Incorporation of the statutory sanctions into our regulations also emphasizes their availability.

A commenter said that section 518 of SMCRA expressly limits enforcement to permittees and that the proposed rule improperly attempts to punish operators, who are not permittees. The commenter is mistaken. Section 518(e) applies to ''any person,'' while section 518(g) applies to ''whoever'' knowingly takes or fails to take certain actions.

A commenter said that the proposed rule ignores the existing mandate to employ alternative enforcement actions. There is no such mandate, except in the context of 30 CFR 845.15(b)(2), which applies only to certain cessation orders and is not germane to this rulemaking. Furthermore, the final rule does require the use of certain alternative enforcement actions in specified circumstances.

A commenter suggested the term ''alternative enforcement'' should be changed to ''additional enforcement'' to clarify that the provisions involve additional steps a regulatory authority may take to make a violator comply with the Act.

We do not believe adopting the commenter's suggestion is necessary. Alternative enforcement actions are, in fact, additional enforcement mechanisms authorized under the Act to compel compliance with the Act when primary enforcement mechanisms do not result in the abatement or correction of a violation. We have used the term ''alternative enforcement'' in this manner since the early days of the regulatory program without creating confusion. The same commenter expressed concern that States sometimes use alternative enforcement instead of ''regular enforcement.'' We stress that the provisions for alternative enforcement are to be used, as appropriate, in conjunction with what the commenter calls ''regular enforcement.''

Specific Comments on Proposed Part 846

Following are descriptions of the proposed provisions, how the proposed provisions are disposed of in this final rule, and how we addressed the comments we received on them.

§ 846.1—Scope

We proposed to revise the scope of part 846 to conform to the proposed provisions for alternative enforcement. Since we did not adopt the revisions proposed in part 846, we also did not adopt the proposal to revise the scope at § 846.1. We received no comments on the proposed revision.

§ 846.5—Definitions

Unwarranted failure to comply. We proposed to revise the definition of *unwarranted failure to comply* and move the definition from § 843.5 to § 846.5. Since we are not revising existing § 843.13, the existing definition for *unwarranted failure to comply* remains unchanged at 30 CFR 843.5.

Violation, failure, or refusal. We proposed to retain the existing definition of *violation, failure, or refusal* in part 846. As part of our effort to consolidate definitions, we are instead moving the definition of *violation, failure, or refusal* in modified form to § 701.5.

Proposed § 846.11—Criminal Penalties

We proposed to add new regulations to provide for criminal penalties under the authority of sections 518(e) and 518(g) of the Act. We proposed to incorporate these provisions in part 846. In this final rule, we are adopting provisions for criminal penalties at § 847.11.

A commenter asserted that the proposed rule would give both OSM and primacy States the option of not pursuing criminal conviction for false statements, including those in permit applications, and the option of not penalizing mine operators who do not abate violations.

The final rule does not provide the regulatory authority with the option not to pursue abatement or correction of a violation. Furthermore, under final § 847.11(c), a regulatory authority must request that the Attorney General pursue criminal penalties against any person who knowingly makes a false statement, representation, or certification, or who knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under

the Act. However, the Attorney General has prosecutorial discretion in deciding whether to act on those requests. We have no authority under SMCRA to limit that discretion.

A commenter claimed the proposed provisions for criminal penalties improperly merged paragraphs (e), (f), and (g) of section 518 into one regulatory provision. Final § 847.11 implements only sections 518(e) and (g) of SMCRA. Neither SMCRA nor any other law prohibits us from addressing these sections of the Act in the same section of our regulations. The regulations implementing section 518(f) of SMCRA, 30 U.S.C. 1268(f), appear in 30 CFR part 846.

Commenters said the proposed § 846.11 included persons not mentioned in the statute. Section 518(e) of the Act applies to ''any person'' without limitation. Nonetheless, because of our desire to more closely conform to the language of the Act, we are not adopting proposed § 846.11(b), which would have more specifically identified the persons subject to criminal penalties.

Several commenters cited proposed § 846.11 as proof that ''verbs other than 'shall' '' negate the mandatory enforcement provisions of SMCRA. Another commenter said that section 518(g) of the Act requires us to pursue criminal conviction of persons making false statements and that the word ''may'' makes this enforcement requirement optional. The commenters have misinterpreted the meaning of ''shall'' in section 518(e) and (g) of SMCRA. As used in those sections, ''shall'' does not require enforcement, it only specifies the punishment that applies upon conviction.

Final § 847.11 requires that the regulatory authority refer all cases meeting the criteria of section 518(e) and (g) to the Attorney General, who has the discretion to determine whether to act upon the referral.

Several commenters said we should not use the proposed criminal sanctions to ''go after'' certified controllers under proposed § 778.13(m). In substance, these commenters suggest that persons certified as controllers under proposed § 778.13(m), which appears in revised form in § 778.11(d) of the final rule, should not be targeted for pursuit of criminal penalties. We do not anticipate that certified controllers will be singled out for criminal prosecution. Each case will be decided on its own merits.

Proposed § 846.12—Individual Civil Penalties

We proposed to revise the existing provisions for individual civil penalties and incorporate them into a section of alternative enforcement provisions within part 846. We are not adopting the proposed revisions to part 846 in this final rule. Therefore, the existing provisions for individual civil penalties in part 846 remain unchanged.

Proposed § 846.14—Suspension or Revocation of Permits: Pattern of Violations

We proposed to revise § 843.13, which implements section 521(a)(4) of the Act by providing for the suspension or revocation of permits for a pattern of violations, and move it to § 846.14. The proposed rule would have eliminated the restrictions on how a pattern of violations is determined.

Commenters opposed the proposed revisions to existing § 843.13 because the revisions would have expanded the circumstances under which the regulatory authority could issue a show cause order. The commenters also said that violations counted for pattern purposes should be limited to violations that occurred at individual mining operations; that is, they should be permit-specific as in the existing regulations. The commenters also opposed allowing consideration of a controller's compliance history at prior operations to establish a pattern of violations.

We have concluded that revision of the rules governing suspension or revocation of permits for a pattern of violations requires further study. Therefore, we are not adopting proposed § 846.14. Existing § 843.13 remains unchanged.

Proposed § 846.15—Suspension or Revocation of Permits: Failure To Comply With a Permit Condition

This proposed rule would have authorized suspension or revocation of permits for failure to comply with a permit condition imposed under proposed § 773.18.

Some commenters supported proposed § 846.15, asserting that suspension or revocation of permits is a powerful but seldom used enforcement tool. They also claimed that the proposed rule would clarify that suspension or revocation of a permit may be used for failure to comply with any permit condition, not just those that are related to ownership and control. Other commenters opposed proposed § 846.15, especially the circumstances that would prompt a regulatory authority to issue a show cause order for failure to comply with a permit condition.

As discussed in sections VI.E. and VI.H. of this preamble, we are not adopting the permit conditions in proposed § 773.18. Furthermore, we see no need to initiate permit suspension or revocation proceedings for an isolated failure to comply with a permit condition. Therefore, we are not adopting proposed § 846.15.

Proposed § 846.16—Civil Actions for Relief

We proposed to add a new § 846.16 to allow regulatory authorities to pursue civil actions for relief under the authority of section 521(c) of the Act. We are adopting the proposed rule in modified form at final § 847.16. We are not adopting the provision that would have specified the scope of persons subject to civil actions. Instead, final § 847.16(a) limits the scope of this rule to the permittee or the permittee's agent. We made this change so that the final rule conforms to the scope of section 521(c) of the Act.

Several commenters said they supported the use of section 521(c) of SMCRA to pursue injunctions against persons acting in concert with entities linked to outstanding violations. Other commenters argued that the proposed rule improperly applied to persons not mentioned in the statute. Since section 521(c) applies only to the ''permittee or his agent,'' final § 847.16(a) applies only to these persons. We are not adopting the more expansive provisions in proposed § 846.16.

A commenter asserted that proposed § 846.16(a)(1)(v) did not match its preamble description. The commenter said the authority under which the information would be requested is more limited in the preamble discussion. Proposed § 846.16(a)(1)(v) stated that refusal to furnish any information or report requested by a regulatory authority is cause to pursue a civil action for relief. 63 FR 70627. The preamble discussion of proposed § 846.16(a)(1)(v) indicated that refusal to furnish any information or report requested by a regulatory authority under the provisions of the Act or its implementing regulations is cause to pursue a civil action for relief. 64 FR 70614. The difference to which the commenter refers appears to be that information requested under the Act and its implementing regulations is more limiting than any information requested by a regulatory authority. Since section 521(c)(E) applies to a permittee or agent who ''refuses to furnish any information or report requested by the Secretary in furtherance of this Act,'' we have revised final § 847.16(a)(5) to apply only to refusals to furnish any information or report that the regulatory authority

requests ''under the Act or regulatory program.''

A commenter said proposed § 846.16(a)(1)(vi) is inconsistent with the existing regulations at 30 CFR 840.12(b) and 842.13(a)(2), which, the commenter claimed, authorize right of access by State and Federal regulatory authorities. We find no inconsistency among these rules. Final § 847.16(a)(6) provides a means of enforcing the record access requirement of §§ 840.12(b) and 842.13(a)(2) when the permittee refuses to grant access otherwise, *i.e.*, when standard enforcement mechanisms fail.

A commenter claimed that section 521(c)(F) of the Act applies only to those records required to be maintained under SMCRA. Section 521(c)(F) applies to ''such records as the Secretary determines necessary in carrying out the provisions of this Act.'' Because the Act authorizes the adoption of State and Federal regulatory programs, the phrase ''the provisions of this Act'' necessarily includes regulations adopted pursuant to the Act. Therefore, final § 847.16(a)(6) applies to all records that the regulatory authority determines to be ''necessary to carry out the provisions of the Act and its implementing regulations.''

Several commenters asked who the ''we'' is in proposed § 846.16. Final § 847.16(a) clarifies that ''we'' means the regulatory authority.

A commenter suggested that ''will'' should be changed to ''may'' in proposed § 846.16(a). The commenter said ''will'' makes the provision a mandatory action, while ''may'' is more permissive. We are not adopting the recommended change. The circumstances that precipitate a civil action for relief are very specific in the Act. If a regulatory authority encounters one of these circumstances, final § 847.16(a) requires that the regulatory authority refer the case to the Attorney General.

BB. Miscellaneous Cross-References

As a result of certain revisions and redesignations in this final rule, it was necessary to change cross-references appearing in a number of sections which we did not otherwise change in substantive fashion. For example, we changed the cross-reference in 30 CFR 874.16 from ''§ 773.15(b)(1)'' to ''§§ 773.12, 773.13, and 773.14'' to reflect the fact that this rule revises previous § 773.15(b)(1). The amendatory language in this final rule identifies these cross-reference changes.

VII. What Effect Will This Rule Have in Federal Program States and on Indian Lands?

Through cross-referencing in the respective regulatory programs, this final rule applies to all lands in States with Federal regulatory programs. States with Federal regulatory programs include Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. These programs are codified at 30 CFR parts 903, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

VIII. How Will This Rule Affect State Programs?

We will evaluate State regulatory programs approved under 30 CFR part 732 and section 503 of the Act to determine whether any changes in these programs are necessary to maintain consistency with Federal requirements. If we determine that a State program provision needs to be amended as a result of these revisions to the Federal rules, we will notify the State in accordance with 30 CFR 732.17(d).

Section 505(a) of the Act, 30 U.S.C. 1255(a), and 30 CFR 730.11(a) provide that SMCRA and Federal regulations adopted under SMCRA do not supersede any State law or regulation unless that law or regulation is inconsistent with the Act or the Federal regulations adopted under the Act. Section 505(b) of the Act and 30 CFR 730.11(b) provide that we may not construe existing State laws and regulations, or State laws and regulations adopted in the future, as inconsistent with SMCRA or the Federal regulations if these State laws and regulations either provide for more stringent land use and environmental controls and regulations or have no counterpart in the Act or the Federal regulations.

Under 30 CFR 732.15(a), State programs must provide for the State to carry out the provisions of, and meet the purposes of, the Act and its implementing regulations. In addition, that rule requires that State laws and regulations be in accordance with the provisions of the Act and consistent with the Federal regulations. As defined in 30 CFR 730.5, ''consistent with'' and ''in accordance with'' mean that the State laws and regulations are no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act. The definition also provides that these terms mean that the State laws and regulations are no less effective than the Federal regulations in meeting the requirements of the Act. Under 30 CFR 732.17(e)(1), we may require a State program amendment if, as a result of changes in SMCRA or the Federal regulations, the approved State program no longer meets the requirements of SMCRA or the Federal regulations.

Among other things, this rule provides that State regulatory authorities must: (1) use the AVS in determining permit eligibility; (2) enter application, permit, and State violation information into AVS; (3) update and maintain permit and violation information in AVS; and (4) evaluate unabated and uncorrected violations to determine if alternative enforcement actions should be taken to compel the abatement or correction of such violations.

Several commenters said that the proposed rule would enhance and expand State roles. They thanked us for our confidence in the States' decision-making ability. Other commenters said that the rule would tax State resources and that our oversight of permitting decisions and State administrative procedures will likely increase. These commenters said that the rule would require additional personnel, computer hardware, and legal resources to support information collection, tracking and analysis, investigation, alternative enforcement, and permit eligibility determinations. Several commenters said that OSM should be ready to supplement State funding and/or provide technical assistance.

We recognize that these regulations will result in some changes in how we and the States operate. We agree there could be additional demands on Federal and State resources. As States adopt counterparts to our regulatory changes, we will provide them with technical assistance in implementing these changes, if requested. In the interim, we plan to hold various events to discuss the effects of this rulemaking. We also plan to update the various directives, policy statements, manuals, and other guidance documents, as necessary, and make them available to State regulators.

A commenter said that environmental groups could sue States like they sued OSM in the 1970s and '80s and that States want to avoid that possibility. The commenter expressed concern that the requirements that apply to regulatory authorities under the final rule might prompt allegations of a failure to comply with mandated duties. We have no reason to anticipate that these rules will generate citizen suits against the States. While these rules place some new requirements on regulatory authorities, they largely

codify long-standing practices in most States. However, section 520 of the Act does authorize such suits if the State regulatory authority fails to perform any nondiscretionary duty under the Act.

Commenters asked what will become of the AVS Users Guide and the System Advisory Memoranda. We will continue to rely upon and maintain the AVS Users Guide, System Advisory Memoranda, and other similar documents.

IX. Procedural Determinations

A. Executive Order 12866: Regulatory Planning and Review

This document is a significant rule and has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

a. This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule does raise legal or policy issues that have been the subject of extensive litigation.

A cost benefit analysis prepared by OSM indicates that overall the final rule will decrease the administrative cost burden to the coal industry to comply with the new regulations because the majority of applicants will be able to certify that the information currently in AVS is accurate. The final rule will change requirements to allow applicants to reduce certain reporting burdens by making use of OSM's automated AVS to provide ownership, control, and other information that is common to all permit applications submitted by a company. OSM estimates that 75 percent of new permit applicants will be able to take advantage of this change in procedures. The estimated cost savings to the coal industry is approximately $397,000 per year. Estimates also indicated that administrative costs to the Federal government will increase by approximately $10,000 per year and to the State governments by a total of $434,000 per year. The analysis is on file in the OSM administrative record for this rulemaking.

Two commenters claimed that the proposed rule qualifies as a significant rule under Executive Order 12866 because it raises novel legal and policy issues and, therefore, should be reviewed by OMB. As stated above, the final rule is considered significant and has been reviewed by OMB under Executive Order 12866.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the findings that the regulatory additions in the rule will not significantly change costs to industry or to Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

Under the regulations of the Small Business Administration (SBA) at 13 CFR 121.201, the size standard for a small business in coal mining is 500 or fewer employees. OSM neither collects nor maintains data on the number of employees a coal operator and its affiliates may have. Data available to OSM from another Federal agency indicated that out of approximately 4,000 coal mining operations, all but 11 may qualify as a small business under the SBA regulations. Since nearly all would qualify as a small business, the analysis of the impacts of the rule on the entire coal mining industry is in effect a determination of the impacts the rule would have on small entities.

OSM determined the impact of the final rule based on the estimated administrative costs potentially incurred by the coal industry in association with fulfilling the requirement to gather, organize, report and review the information required at the time of a permit application according to 30 CFR Parts 773, 774 and 778. The cost estimates are derived from the information collection clearance package submitted by OSM to OMB for the final regulation. While other costs may be incurred by the industry, OSM believes that these labor costs are the primary source of the costs of compliance with the final rule. For analytical purposes, OSM estimates of the number of applicants/respondents are based on data collected by OSM for the 1999 evaluation year.

OSM estimates that overall the final rule will decrease the administrative cost burden to the industry to comply with the new regulations because a majority of applicants per year will be allowed to certify that the information currently in AVS is accurate. The number of applicants subject to the new regulations range in number from 310 per year for new permits to approximately 4000 per year for all permits, permit revisions, permit renewals, and transfers, assignments and sales of permit rights. The final rule will change requirements to allow applicants to reduce certain reporting burdens by making use of OSM's automated AVS to provide ownership, control, and other information that is common to all permit applications submitted by a company. OSM estimates that 75 percent of permit applicants will be able to take advantage of this change in procedures.

ESTIMATED CHANGE TO INDUSTRY COSTS UNDER FINAL RULE

Status quo prior to final regulation			Final regulation	
30 CFR part	Cost per applicant	Cost to industry	Cost per applicant	Cost to industry
773	$280	$36,250	$280	$36,250
774	1,020	1,693,200	960	1,462,800
778	1,460	394,640	1,290	227,760
Total	2,760	2,124,090	2,530	1,726,810
Net change	final rule compared to status quo ($397,280)			

One commenter stated that the proposed rule did not fully comply with the Regulatory Flexibility Act. The commenter said that OSM provided no facts to substantiate its statement that the rule will not have a significant economic impact on a substantial number of small entities or significantly change costs to the industry, Federal, State, or local governments as required by section 605(b) of the Regulatory Flexibility Act. The commenter also said that the rule would subject small entities to unlawful permit conditions and the threat of losing their permits and that OSM should solicit comments from small entities on how the proposal will affect them, as required by section 609 of the Regulatory Flexibility Act.

OSM disagrees. The proposed rule was issued in compliance with the requirements of section 605(b) of the Regulatory Flexibility Act. The proposed rule contained the certification required by section 605(b) and a statement providing the basis for the certification. A more detailed statement is included above and a cost benefit analysis is on file in the OSM administrative record for this rulemaking. With regard to the requirements of section 609 of the Regulatory Flexibility Act that small entities have an opportunity to participate in the rulemaking, section 609 applies only to rules that will have a significant economic impact on a substantial number of small entities. This rule does not have such an effect. Nevertheless, OSM took several steps to insure public participation by all that might be affected by the rule, both directly and indirectly through their national trade association. OSM held outreach meetings with industry prior to publishing the proposed rule in the **Federal Register**, published a proposed rule in the **Federal Register** with a public comment period that with extensions lasted over four months, issued a press release, made the proposed rule available on the Internet, and met with representatives from the coal industry during the public comment period.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons stated above, this rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because the rule does not impose major new requirements on the coal mining industry or consumers.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises for the reasons stated above.

D. Unfunded Mandates Reform Act of 1995

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

E. Executive Order 12630: Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. This determination is based on the fact that the rule will not have an impact on the use or value of private property and so, does not result in significant costs to the government.

F. Executive Order 13132: Federalism

This rule does not have Federalism implications. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

One commenter objected to OSM's statement that the rule did not have Federalism implications within the meaning of Executive Order 13132. OSM has again reviewed Executive Order 13132 and the provisions of SMCRA and concluded that the rule does not have Federalism implications within the meaning of Executive Order 13132. The provisions of SMCRA delineate the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' States are not required to regulate surface coal mining and reclamation operations under SMCRA, but they may do so if they wish and if they meet certain requirements. SMCRA also provides for Federal funding of 50 percent of the cost of administering State regulatory programs approved under SMCRA. Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA. Further, section 505 of SMCRA specifically provides for the preemption of State laws and regulations that are inconsistent with the provisions of SMCRA.

G. Executive Order 12988: Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule (1) does not unduly burden the judicial system and (2) meets the requirements of sections 3(a) and 3(b)(2) of the order. Additional remarks follow concerning individual elements of the Executive Order:

1. What is the preemptive effect, if any, to be given to the regulation?

This regulation will have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's regulations. Any State law that is inconsistent with or that would preclude implementation of the proposed regulation would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the proposed regulation would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel* versus *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

2. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

3. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable,

given the complexity of topics covered and the mandates of SMCRA.

4. What is the retroactive effect, if any, to be given to the regulation?

This rule is not intended to have retroactive effect.

5. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). Prior to any judicial challenges to the application of the rule, however, administrative proceedings must be exhausted, unless specified otherwise. See final 30 CFR 773.23(d). In situations involving OSM application of the rule, applicable administrative proceedings may be found in 43 CFR part 4. In situations involving state regulatory authority application of the provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular state program.

6. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are defined in the rule or set forth in 30 CFR 700.5 and 701.5.

7. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act, agencies may not conduct or sponsor a collection of information unless the collection displays a currently valid OMB control number. Also, no person must respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. Therefore, in accordance with 44 U.S.C. 3501 *et seq,* we submitted the information collection and recordkeeping requirements of 30 CFR Parts 773, 774, and 778 to OMB for review and approval. OMB subsequently approved the collection activities and assigned them OMB control numbers 1029–0115, 1029–0116, and 1029–0117, which appear in §§ 773.3, 774.9, and 778.8, respectively.

To obtain a copy of our information collection clearance authority, explanatory information and related forms, contact John A. Trelease, OSM's Information Collection Clearance Officer, at (202) 208–2783 or by e-mail at jtreleas@osmre.gov.

One commenter stated that the proposed rule violated the Paperwork Reduction Act by requiring the collection of information not specifically required by SMCRA. OSM disagrees. Section 507(b) lists some of the information required in a permit application and states that the application shall include, ''among other things,'' 17 enumerated items. The use of the phrase ''among other things'' clearly indicates that the list in section 507(b) was not intended to be all inclusive. Further, many of the information collection requirements contained in the rule have been previously litigated and the courts have held that the listing of information required of permit applicants in the Act is not exhaustive and does not preclude the Secretary from requiring the States to secure additional information needed to insure compliance with the Act.

I. National Environmental Policy Act of 1969 and Record of Decision

OSM has prepared an environmental assessment (EA) for this rule and has made a finding that it would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. section 4332(2)(C). The EA and finding of no significant impact are on file in the OSM Administrative Record for this rule.

List of Subjects

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 724

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

30 CFR Part 750

Indian-lands, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 773

Administrative practice and procedure, Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 774

Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 775

Administrative practice and procedure, Surface mining, Underground mining.

30 CFR Part 778

Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 785

Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 795

Grant programs-natural resources, Reporting and record keeping requirements, Small business, Surface mining, Technical assistance, Underground mining.

30 CFR Part 817

Environmental protection, Reporting and record keeping requirements, Surface mining.

30 CFR Part 840

Intergovernmental relations, Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 842

Law enforcement, Surface mining, Underground mining.

30 CFR Part 843

Administrative practice and procedure, Law enforcement, Reporting and record keeping requirements, Surface mining, Underground mining.

30 CFR Part 846

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

30 CFR Part 847

Administrative practice and procedure, Law enforcement, Penalties, Surface mining, Underground mining.

30 CFR Part 874

Indian-lands, Surface mining, Underground mining.

30 CFR Part 875

Indian-lands, Surface mining, Underground mining.

30 CFR Part 903

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 905

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 910

Environmental protection, Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 921

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 922

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 937

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 939

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR part 947

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 25, 2000.

Sylvia V. Baca,

Assistant Secretary, Land and Minerals Management.

For the reasons discussed in the preamble, the Office of Surface Mining amends 30 CFR chapter VII as follows.

PART 701—PERMANENT REGULATORY PROGRAM

1. Revise the authority citation for part 701 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Amend § 701.5 as follows:

a. Remove the definition of *Willful violation.*

b. In the definition of *Unanticipated event or condition* revise the reference from ''§ 773.15'' to read ''§ 773.13.''

c. Add the following definitions in alphabetical order to read as set forth below:

§ 701.5 Definitions.

* * * * *

Applicant/Violator System or *AVS* means an automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing the Act.

* * * * *

Control or *controller,* when used in parts 773, 774, and 778 and § 843.21 of this chapter, refers to or means—

(1) A permittee of a surface coal mining operation;

(2) An operator of a surface coal mining operation;

(3) A general partner in a partnership;

(4) A person who has the ability to, directly or indirectly, commit the financial or real property assets or working resources of an applicant, a permittee, or an operator; or

(5) Any other person who has the ability, alone or in concert with others, to determine, indirectly or directly, the manner in which a surface coal mining operation is conducted. Examples of persons who may, but do not necessarily, meet this criterion include—

(i) The president, an officer, a director (or a person performing functions similar to a director), or an agent of an entity;

(ii) A partner in a partnership, or a participant, member, or manager of a limited liability company;

(iii) A person who owns between 10 and 50 percent of the voting securities or other forms of ownership of an entity, depending upon the relative percentage of ownership compared to the percentage of ownership by other persons, whether a person is the greatest single owner, or whether there is an opposing voting bloc of greater ownership;

(iv) An entity with officers or directors in common with another entity, depending upon the extent of overlap;

(v) A person who owns or controls the coal mined or to be mined by another person through lease, assignment, or other agreement and who also has the right to receive or direct delivery of the coal after mining; and

(vi) A person who contributes capital or other working resources under conditions that allow that person to substantially influence the manner in which a surface coal mining operation is or will be conducted. Relevant contributions of capital or working resources include, but are not limited to—

(A) Providing mining equipment in exchange for the coal to be extracted;

(B) Providing the capital necessary to conduct a surface coal mining operation when that person also directs the disposition of the coal; or

(C) Personally guaranteeing the reclamation bond in anticipation of a future profit or loss from a surface coal mining operation.

* * * * *

Knowing or *knowingly* means that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.

* * * * *

Own, owner, or *ownership,* as used in parts 773, 774, and 778 and § 843.21 of this chapter (except when used in the context of ownership of real property), means being a sole proprietor or possessing or controlling in excess of 50 percent of the voting securities or other instruments of ownership of an entity.

* * * * *

Violation, when used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act and related regulations, means—

(1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(2) A noncompliance for which OSM has provided one or more of the following types of notice or a State regulatory authority has provided equivalent notice under corresponding provisions of a State regulatory program—

(i) A notice of violation under § 843.12 of this chapter.

(ii) A cessation order under § 843.11 of this chapter.

(iii) A final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under part 845 or 846 of this chapter.

(iv) A bill or demand letter pertaining to delinquent reclamation fees owed under part 870 of this chapter.

(v) A notice of bond forfeiture under § 800.50 of this chapter when—

(A) One or more violations upon which the forfeiture was based have not been abated or corrected;

(B) The amount forfeited and collected is insufficient for full

reclamation under § 800.50(d)(1) of this chapter, the regulatory authority orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order; or

(C) The site is covered by an alternative bonding system approved under § 800.11(e) of this chapter, that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-specific bond, and the person has not complied with the reimbursement requirement and paid any associated penalties.

Violation, failure or refusal, for purposes of parts 724 and 846 of this chapter, means—

(1) A failure to comply with a condition of a Federally-issued permit or of any other permit that OSM is directly enforcing under section 502 or 521 of the Act or the regulations implementing those sections; or

(2) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act.

Violation notice means any written notification from a regulatory authority or other governmental entity, as specified in the definition of *violation* in this section.

* * * * *

Willful or *willfully* means that a person who authorized, ordered or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted—

(1) Intentionally, voluntarily, or consciously; and

(2) With intentional disregard or plain indifference to legal requirements.

§ 701.11 [Amended]

3. Revise the reference in the second sentence of § 701.11(a) from ''30 CFR 773.11(b)'' to read ''§ 773.4(b) of this chapter.''

PART 724—INDIVIDUAL CIVIL PENALTIES

4. Revise the authority citation for part 724 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 724.5 [Removed]

5. Remove § 724.5.

PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

6. Revise the authority citation for part 750 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

7. Revise § 750.12(c)(2)(ii) to read as follows:

§ 750.12 Permit applications.

* * * * *

(c) * * *

(2) * * *

(ii) Sections 773.4, 773.15(c), 777.17;

* * * * *

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

8. Revise the authority citation for part 773 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, and 16 U.S.C. 1531 *et seq.*

9. Remove the following sections and paragraphs:

a. § 773.5

b. § 773.15(a) introductory heading

c. § 773.15(b)

d. § 773.15(c)(1)

e. § 773.15(e)

f. § 773.17(h)

g. § 773.20

h. § 773.24

10. Redesignate sections and paragraphs as indicated in the following table:

Section	is redesignated as...
773.10	773.3
773.11	773.4
773.12	773.5
773.13	773.6
773.15, section heading.	773.7
773.15(a)(1)	773.7(a)
773.15(a)(2)	773.7(b)
773.15(c)	773.15
773.15(c)(2)	773.15(b)
773.15(c)(3)	773.15(c)
773.15(c)(3)(i)	773.15(c)(1)
773.15(c)(3)(ii)	773.15(c)(2)
773.15(c)(4)	773.15(d)
773.15(c)(5)	773.15(e)
773.15(c)(6)	773.15(f)
773.15(c)(7)	773.15(g)
773.15(c)(8)	773.15(h)
773.15(c)(9)	773.15(i)
773.15(c)(10)	773.15(j)
773.15(c)(11)	773.15(k)
773.15(c)(12)	773.15(l)
773.15(c)(13)	773.15(m)
773.15(d)	773.16

11. Revise § 773.3 to reads as follows:

§ 773.3 Information collection.

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information in processing surface coal mining permit applications. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029–0115.

(b) We estimate that the public reporting burden for this part will average 36 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0115 in any correspondence.

§ 773.6 [Amended]

12. Revise the reference in newly designated § 773.5(a)(3)(ii) from ''§ 773.12'' to read ''§ 773.5.''

13. Add new §§ 773.8, 773.9, 773.10, 773.11, 773.12, 773.13, 773.14, and paragraphs 773.15(a) and 773.15(n) to read as follows:

§ 773.8 General provisions for review of permit application information and entry of information into AVS.

(a) Based on an administratively complete application, we, the regulatory authority, must undertake the reviews required under §§ 773.9 through 773.11 of this part.

(b) We will enter into AVS—

(1) The ownership and control information you submit under §§ 778.11 and 778.12(c)of this subchapter.

(2) The information you submit under § 778.14 of this subchapter pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired.

(c) We must update the information referred to in paragraph (b) of this section in AVS upon our verification of any additional information submitted or discovered during our permit application review.

§ 773.9 Review of applicant, operator, and ownership and control information.

(a) We, the regulatory authority, will rely upon the applicant, operator, and ownership and control information that you, the applicant, submit under § 778.11 of this subchapter, information from AVS, and any other available information, to review your and your operator's business structure and ownership or control relationships.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

§ 773.10 Review of permit history.

(a) We, the regulatory authority, will rely upon the permit history information you, the applicant, submit under § 778.12 of this subchapter, information from AVS, and any other available information to review your and your operator's permit histories. We must conduct this review before making a permit eligibility determination under § 773.12 of this part.

(b) We will also determine if you, your operator, or any of your controllers disclosed under §§ 778.11(c)(5) and 778.11(d) of this subchapter have previous mining experience.

(c) If you, your operator, your controllers, or your operator's controllers do not have any previous mining experience, we may conduct additional reviews under § 774.11(f) of this subchapter. The purpose of this review will be to determine if someone else with mining experience controls the mining operation and was not disclosed under § 778.11(c)(5) of this subchapter.

§ 773.11 Review of compliance history.

(a) We, the regulatory authority, will rely upon the violation information supplied by you, the applicant, under § 778.14 of this subchapter, a report from AVS, and any other available information to review histories of compliance with the Act or the applicable State regulatory program, and any other applicable air or water quality laws, for—

(1) You;

(2) Your operator;

(3) Operations you own or control; and

(4) Operations your operator owns or controls.

(b) We must conduct the review required under paragraph (a) of this section before making a permit eligibility determination under § 773.12 of this part.

§ 773.12 Permit eligibility determination.

Based on the reviews required under §§ 773.9 through 773.11 of this part, we, the regulatory authority, will determine whether you, the applicant, are eligible for a permit under section 510(c) of the Act.

(a) Except as provided in §§ 773.13 and 773.14 of this part, you are not eligible for a permit if we find that any surface coal mining operation that—

(1) You directly own or control has an unabated or uncorrected violation;

(2) You or your operator indirectly own or control, regardless of when the ownership or control began, has an unabated or uncorrected violation cited on or after November 2, 1988; or

(3) You or your operator indirectly own or control has an unabated or uncorrected violation, regardless of the date the violation was cited, and your ownership or control was established on or after November 2, 1988.

(b) You are eligible to receive a permit under section 510(c) of the Act if any surface coal mining operation you or your operator indirectly own or control has an unabated or uncorrected violation and both the violation and your assumption of ownership or control occurred before November 2, 1988. However, you are not eligible to receive a permit if there was an established legal basis, independent of authority under section 510(c) of the Act, to deny the permit at the time you or your operator assumed indirect ownership or control or at the time the violation was cited, whichever is earlier.

(c) We will not issue you a permit if you or your operator are permanently ineligible to receive a permit under § 774.11(c) of this subchapter.

(d) After we approve your permit under § 773.15 of this part, we will not issue the permit until you comply with the information update and certification requirement of § 778.9(d) of this subchapter. After you complete that requirement, we will again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect your permit eligibility under paragraphs (a) and (b) of this section. We will request this report no more than five business days before permit issuance under § 773.19 of this part.

(e) If you are ineligible for a permit under this section, we will send you written notification of our decision. The notice will tell you why you are ineligible and include notice of your appeal rights under part 775 of this subchapter and 43 CFR 4.1360 through 4.1369.

§ 773.13 Unanticipated events or conditions at remining sites.

(a) You, the applicant, are eligible for a permit under § 773.12 if an unabated violation—

(1) Occurred after October 24, 1992; and

(2) Resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was—

(i) Issued before September 30, 2004, including subsequent renewals; and

(ii) Held by the person applying for the new permit.

(b) For permits issued under § 785.25 of this subchapter, an event or condition is presumed to be unanticipated for the purpose of this section if it—

(1) Arose after permit issuance;

(2) Was related to prior mining; and

(3) Was not identified in the permit application.

§ 773.14 Eligibility for provisionally issued permits.

(a) This section applies to you if you are an applicant who owns or controls a surface coal mining and reclamation operation with—

(1) A notice of violation issued under § 843.12 of this chapter or the State regulatory program equivalent for which the abatement period has not yet expired; or

(2) A violation that is unabated or uncorrected beyond the abatement or correction period.

(b) We, the regulatory authority, may find you eligible for a provisionally issued permit if you demonstrate that one or more of the following circumstances exists with respect to all violations listed in paragraph (a) of this section—

(1) For violations meeting the criteria of paragraph (a)(1) of this section, you certify that the violation is being abated to the satisfaction of the regulatory authority with jurisdiction over the violation, and we have no evidence to the contrary.

(2) As applicable, you, your operator, and operations that you or your operator own or control are in compliance with the terms of any abatement plan (or, for delinquent fees or penalties, a payment schedule) approved by the agency with jurisdiction over the violation.

(3) You are pursuing a good faith—

(i) Challenge to all pertinent ownership or control listings or findings under §§ 773.25 through 773.27 of this part; or

(ii) Administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the

listing or finding and that decision remains in force.

(4) The violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation, unless there is an initial judicial decision affirming the violation and that decision remains in force.

(c) We will consider a provisionally issued permit to be improvidently issued, and we must immediately initiate procedures under §§ 773.22 and 773.23 of this part to suspend or rescind that permit, if—

(1) Violations included in paragraph (b)(1) of this section are not abated within the specified abatement period;

(2) You, your operator, or operations that you or your operator own or control do not comply with the terms of an abatement plan or payment schedule mentioned in paragraph (b)(2) of this section;

(3) In the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in paragraph (b)(3) or (4) of this section affirms the validity of the violation or the ownership or control listing or finding; or

(4) The initial judicial review decision referenced in paragraph (b)(3)(ii) or (4) of this section affirms the validity of the violation or the ownership or control listing or finding.

§ 773.15 Written findings for permit application approval.

* * * * *

(a) The application is accurate and complete and the applicant has complied with all requirements of the Act and the regulatory program.

* * * * *

(n) The applicant is eligible to receive a permit, based on the reviews under §§ 773.7 through 773.14 of this part.

14. Revise §§ 773.21 through 773.23 to read as follows:

§ 773.21 Initial review and finding requirements for improvidently issued permits.

(a) If we, the regulatory authority, have reason to believe that we improvidently issued a permit to you, the permittee, we must review the circumstances under which the permit was issued. We will make a preliminary finding that your permit was improvidently issued if, under the permit eligibility criteria of the applicable regulations implementing section 510(c) of the Act in effect at the time of permit issuance, your permit should not have been issued because you or your operator owned or controlled a surface coal mining and reclamation operation with an unabated or uncorrected violation.

(b) We will make a finding under paragraph (a) of this section only if you or your operator—

(1) Continue to own or control the operation with the unabated or uncorrected violation;

(2) The violation remains unabated or uncorrected; and

(3) The violation would cause you to be ineligible under the permit eligibility criteria in our current regulations.

(c) When we make a preliminary finding under paragraph (a) of this section, we must—

(1) Serve you with a written notice of the preliminary finding; and

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(d) Within 30 days of receiving a notice under paragraph (c) of this section, you may challenge the preliminary finding by providing us with evidence as to why the permit was not improvidently issued under the criteria in paragraphs (a) and (b) of this section.

(e) The provisions of §§ 773.25 through 773.27 of this part apply when a challenge under paragraph (d) of this section concerns a preliminary finding under paragraphs (a) and (b)(1) of this section that you or your operator currently own or control, or owned or controlled, a surface coal mining operation.

§ 773.22 Notice requirements for improvidently issued permits.

(a) We, the regulatory authority, must serve you, the permittee, with a written notice of proposed suspension or rescission, together with a statement of the reasons for the proposed suspension of rescission, if—

(1) After considering any evidence submitted under § 773.21(d) of this part, we find that a permit was improvidently issued under the criteria in paragraphs (a) and (b) of § 773.21 of this part; or

(2) Your permit was provisionally issued under § 773.14(b) of this part and one or more of the conditions in §§ 773.14(c)(1) through (4) exists.

(b) If we propose to suspend your permit, we will provide 60 days notice.

(c) If we propose to rescind your permit, we will provide 120 days notice.

(d) We will also post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(e) If you wish to appeal the notice, you must exhaust administrative remedies under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority).

(f) After we serve you with a notice of proposed suspension or rescission under this section, we will take action under § 773.23 of this part.

(g) The regulations for service at § 843.14 of this chapter, or the State regulatory program equivalent, will govern service under this section.

(h) The times specified in paragraphs (b) and (c) of this section will apply unless you obtain temporary relief under the procedures at 43 CFR 4.1376 or the State regulatory program equivalent.

§ 773.23 Suspension or rescission requirements for improvidently issued permits.

(a) Except as provided in paragraph (b) of this section, we, the regulatory authority, must suspend or rescind your permit upon expiration of the time specified in § 773.22(b) or (c) of this part unless you submit evidence and we find that—

(1) The violation has been abated or corrected to the satisfaction of the agency with jurisdiction over the violation;

(2) You or your operator no longer own or control the relevant operation;

(3) Our finding for suspension or rescission was in error;

(4) The violation is the subject of a good faith administrative or judicial appeal (unless there is an initial judicial decision affirming the violation, and that decision remains in force);

(5) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(6) You are pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding (unless there is an initial judicial decision affirming the listing or finding, and that decision remains in force).

(b) If you have requested administrative review of a notice of proposed suspension or rescission under § 773.22(e) of this part, we will not suspend or rescind your permit unless and until the Office of Hearings and Appeals or its State counterpart affirms our finding that your permit was improvidently issued.

(c) When we suspend or rescind your permit under this section, we must—

(1) Issue you a written notice requiring you to cease all surface coal mining operations under the permit; and

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(d) If we suspend or rescind your permit under this section, you may request administrative review of the notice under the procedures at 43 CFR 4.1370 through 4.1377 (when OSM is the regulatory authority) or under the State regulatory program equivalent (when a State is the regulatory authority). Alternatively, you may seek judicial review of the notice.

15. Revise § 773.25 and add §§ 773.26 through 773.28 to read as follows:

§ 773.25 Who may challenge ownership or control listings and findings.

You may challenge a listing or finding of ownership or control using the provisions under §§ 773.26 and 773.27 of this part if you are—

(a) Listed in a permit application or in AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof;

(b) Found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under §§ 773.21 or 774.11(f) of this subchapter; or

(c) An applicant or permittee affected by an ownership or control listing or finding.

§ 773.26 How to challenge an ownership or control listing or finding.

This section applies to you if you challenge an ownership or control listing or finding.

(a) To challenge an ownership or control listing or finding, you must submit a written explanation of the basis for the challenge, along with any evidence or explanatory materials you wish to provide under § 773.27(b) of this part, to the regulatory authority, as identified in the following table.

If the challenge concerns a . . .	Then you must submit a written explanation to . . .
(1) Pending Federal permit application or Federally issued permit	OSM.
(2) Pending State permit application or State-issued permit	the State regulatory authority with jurisdiction over the application or permit.

(b) The provisions of this section and of §§ 773.27 and 773.28 of this part apply only to challenges to ownership or control listings or findings. You may not use these provisions to challenge your liability or responsibility under any other provision of the Act or its implementing regulations.

(c) When the challenge concerns a violation under the jurisdiction of a different regulatory authority, the regulatory authority with jurisdiction over the permit application or permit must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.

(d) A regulatory authority responsible for deciding a challenge under paragraph (a) of this section may request an investigation by the AVS Office.

§ 773.27 Burden of proof for ownership or control challenges.

This section applies to you if you challenge an ownership or control listing or finding.

(a) When you challenge a listing or finding of ownership or control of a surface coal mining operation, you must prove by a preponderance of the evidence that you either—

(1) Do not own or control the entire operation or relevant portion or aspect thereof; or

(2) Did not own or control the entire operation or relevant portion or aspect thereof during the relevant time period.

(b) In meeting your burden of proof, you must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority. The materials presented in connection with your challenge will become part of the permit file, an investigation file, or another public file. If you request, we will hold as confidential any information you submit under this paragraph which is not required to be made available to the public under § 842.16 of this chapter (when OSM is the regulatory authority) or under § 840.14 of this chapter (when a State is the regulatory authority).

(c) Materials you may submit in response to the requirements of paragraph (b) of this section include, but are not limited to—

(1) Notarized affidavits containing specific facts concerning the duties that you performed for the relevant operation, the beginning and ending dates of your ownership or control of the operation, and the nature and details of any transaction creating or severing your ownership or control of the operation.

(2) Certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records.

(3) Certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency.

(4) An opinion of counsel, when supported by—

(i) Evidentiary materials;

(ii) A statement by counsel that he or she is qualified to render the opinion; and

(iii) A statement that counsel has personally and diligently investigated the facts of the matter.

§ 773.28 Written agency decision on challenges to ownership or control listings or findings.

(a) Within 60 days of receipt of your challenge under § 773.26(a) of this part, we, the regulatory authority identified under § 773.26(a) of this part, will review and investigate the evidence and explanatory materials you submit and any other reasonably available information bearing on your challenge and issue a written decision. Our decision must state whether you own or control the relevant surface coal mining operation, or owned or controlled the operation, during the relevant time period.

(b) We will promptly provide you with a copy of our decision by either—

(1) Certified mail, return receipt requested; or

(2) Any means consistent with the rules governing service of a summons and complaint under Rule 4 of the Federal Rules of Civil Procedure, or its State regulatory program counterparts.

(c) Service of the decision on you is complete upon delivery and is not incomplete if you refuse to accept delivery.

(d) We will post all decisions made under this section on AVS and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(e) Any person who receives a written decision under this section, and who wishes to appeal that decision, must exhaust administrative remedies under the procedures at 43 CFR 4.1380 through 4.1387 or, when a State is the regulatory authority, the State regulatory program counterparts, before seeking judicial review.

(f) Following our written decision or any decision by a reviewing administrative or judicial tribunal, we must review the information in AVS to determine if it is consistent with the decision. If it is not, we must promptly

revise the information in AVS to reflect the decision.

16. Revise the heading for part 774 to read as follows:

PART 774—REVISION; RENEWAL; TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS; POST-PERMIT ISSUANCE REQUIREMENTS; AND OTHER ACTIONS BASED ON OWNERSHIP, CONTROL, AND VIOLATION INFORMATION

17. Revise the authority citation for part 774 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

18. Redesignate sections as indicated in the following table:

Section	is redesignated as . . .
774.10	774.9
774.11	774.10

19. Revise § 774.1 to read as follows:

§ 774.1 Scope and purpose.

This part provides requirements for revision; renewal; transfer, assignment, or sale of permit rights; entering and updating information in AVS following the issuance of a permit; post-permit issuance requirements for regulatory authorities and permittees; and other actions based on ownership, control, and violation information.

20. Revise newly redesignated § 774.9 to read as follows:

§ 774.9 Information collection.

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Regulatory authorities will use this information to: (1) Determine if the applicant meets the requirements for revision; renewal; transfer, assignment, or sale of permit rights;

(2) Enter and update information in AVS following the issuance of a permit; and

(3) Fulfill post-permit issuance requirements and other obligations based on ownership, control, and violation information. Persons must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029–0116.

(b) We estimate that the public reporting burden for this part will average 8 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, Room 210, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0116 in any correspondence.

21. Add new § 774.11 to read as follows:

§ 774.11 Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information.

(a) For the purposes of future permit eligibility determinations and enforcement actions, we, the regulatory authority, must enter into AVS the data shown in the following table—

We must enter into AVS all . . .	within 30 days after . . .
(1) Permit records	the permit is issued or subsequent changes made.
(2) Unabated or uncorrected violations	the abatement or correction period for a violation expires.
(3) Changes of ownership or control	receiving notice of a change.
(4) Changes in violation status	abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal.

(b) If, at any time, we discover that any person owns or controls an operation with an unabated or uncorrected violation, we will determine whether enforcement action is appropriate under part 843, 846 or 847 of this chapter. We must enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(c) We must serve a preliminary finding of permanent permit ineligibility under section 510(c) of the Act on you, an applicant or operator, if the criteria in paragraphs (c)(1) and (c)(2) are met. In making a finding under this paragraph, we will only consider control relationships and violations which would make, or would have made, you ineligible for a permit under §§ 773.12(a) and (b) of this subchapter. We must make a preliminary finding of permanent permit ineligibility if we find that—

(1) You control or have controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations under section 510(c) of the Act; and

(2) The violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate your intent not to comply with the Act, its implementing regulations, the regulatory program, or your permit.

(d) You may request a hearing on a preliminary finding of permanent permit ineligibility under 43 CFR 4.1350 through 4.1356.

(e) We must enter the results of the finding and any hearing into AVS.

(f) At any time, we may identify any other person who owns or controls an entire operation or any relevant portion or aspect thereof. If we identify such a person, we must—

(1) Issue a written finding to the person and the applicant or permittee describing the nature and extent of ownership or control; and

(2) Enter our finding under paragraph (f)(1) of this section into AVS; and

(3) Require the person to—

(i) Disclose their identity under § 778.11(c)(5) of this subchapter; and

(ii) Certify they are a controller under § 778.11(d) of this subchapter, if appropriate.

(g) A person we identify under paragraph (f)(1) of this section may challenge the finding using the provisions of §§ 773.25, 773.26 and 773.27 of this subchapter.

22. Add § 774.12 to read as follows:

§ 774.12 Post-permit issuance information requirements for permittees.

(a) Within 30 days after the issuance of a cessation order under § 843.11 of this chapter, or its State regulatory program equivalent, you, the permittee, must provide or update all the information required under § 778.11 of this subchapter.

(b) You do not have to submit information under paragraph (a) of this section if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.

(c) Within 60 days of any addition, departure, or change in position of any

person identified in § 778.11(c) or (d) of this subchapter, you must provide—

(1) The information required under § 778.11(e) of this subchapter; and

(2) The date of any departure.

§ 774.13 [Amended]

23. Amend § 774.13 as follows:

a. Revise the reference in the first sentence § 774.13(b)(2) from ''§§ 773.13'' to read ''§§ 773.6.''

b. Revise the reference in § 774.13(c) from ''§ 773.15(c)'' to read ''§ 773.15.''

§ 774.15 [Amended]

24. Revise the reference in § 774.15(b)(3) from ''§§ 773.13'' to read ''§§ 773.6.''

§ 774.17 [Amended]

25. Revise the reference in § 774.17(d)(1) from ''§ 773.15(b) and (c)'' to read ''§§ 773.12 and 773.15.''

PART 775—ADMINISTRATIVE AND JUDICIAL REVIEW OF DECISIONS

26. The authority citation for part 775 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 775.11 [Amended]

27. Revise the reference in the third sentence of § 775.11(b)(1) from ''§ 773.13(c)'' to read ''§ 773.6(c).''

PART 778—PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

28. Revise the authority citation for part 778 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

29. Redesignate § 778.10 as § 778.8 and revise it to read as follows:

§ 778.8 Information collection.

(a) Under the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. Section 507(b) of the Act provides that persons applying for a permit to conduct surface coal mining operations must submit to the regulatory authority certain information regarding the applicant and affiliated entities, their compliance status and history, property ownership and other property rights, violation information, right of entry, liability insurance, the status of unsuitability claims, and proof of publication of a newspaper notice. The regulatory authority uses this information to ensure that all legal, financial and compliance requirements are satisfied before issuance of a permit. Persons seeking to conduct surface coal mining operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB clearance number for this part is 1029–0117.

(b) We estimate that the public reporting and record keeping burden for this part averages 27 hours per response, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these information collection and record keeping requirements, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Avenue, NW, Washington, DC 20240. Please refer to OMB Control Number 1029–0117 in any correspondence.

30. Add § 778.9 to read as follows:

§ 778.9 Certifying and updating existing permit application information.

In this section, ''you'' means the applicant and ''we'' or ''us'' means the regulatory authority.

(a) If you have previously applied for a permit and the required information is already in AVS, then you may update the information as shown in the following table.

If . . .	then you . . .
(1) All or part of the information already in AVS is accurate and complete.	may certify to us by swearing or affirming, under oath and in writing, that the relevant information in AVS is accurate, complete, and up to date.
(2) Part of the information in AVS is missing or incorrect	must submit to us the necessary information or corrections and swear or affirm, under oath and in writing, that the information you submit is accurate and complete.
(3) You can neither certify that the data in AVS is accurate and complete nor make needed corrections.	must include in your permit application the information required under this part.

(b) You must swear or affirm, under oath and in writing, that all information you provide in an application is accurate and complete.

(c) We may establish a central file to house your identity information, rather than place duplicate information in each of your permit application files. We will make the information available to the public upon request.

(d) After we approve an application, but before we issue a permit, you must update, correct, or indicate that no change has occurred in the information previously submitted under this section and §§ 778.11 through 778.14 of this part.

31. Add § 778.11 to read as follows:

§ 778.11 Providing applicant, operator, and ownership and control information.

(a) You, the applicant, must provide in the permit application—

(1) A statement indicating whether you and your operator are corporations, partnerships, sole proprietorships, or other business entities;

(2) Taxpayer identification numbers for you and your operator.

(b) You must provide the name, address, and telephone number for—

(1) The applicant.

(2) Your resident agent who will accept service of process.

(3) Any operator, if different from the applicant.

(4) Person(s) responsible for submitting the Coal Reclamation Fee Report (Form OSM–1) and for remitting the reclamation fee payment to OSM.

(c) For you and your operator, you must provide the information required by paragraph (e) of this section for every—

(1) Officer.

(2) Director.

(3) Person performing a function similar to a director.

(4) Person who owns 10 to 50 percent of the applicant or the operator.

(5) Person who owns or controls the applicant and person who owns or controls the operator. For each owner or controller who does not own or control an entire surface coal mining operation, you may list the portion or aspect of the

operation which that person owns or controls.

(d) The natural person with the greatest level of effective control over the entire proposed surface coal mining operation must submit a certification, under oath, that he or she controls the proposed surface coal mining operation.

(e) You must provide the following information for each person listed in paragraphs (c) and (d) of this section—

(1) The person's name, address, and telephone number.

(2) The person's position title and relationship to you, including percentage of ownership and location in the organizational structure.

(3) The date the person began functioning in that position.

32. Add § 778.12 to read as follows:

§ 778.12 Providing permit history information.

(a) You, the applicant, must provide a list of all names under which you, your operator, your partners or principal shareholders, and your operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of submission of the application.

(b) For you and your operator, you must provide a list of any pending permit applications for surface coal mining operations filed in the United States. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary.

(c) For any surface coal mining operations that you or your operator owned or controlled within the five-year period preceding the date of submission of the application, and for any surface coal mining operation you or your operator own or control on that date, you must provide the—

(1) Permittee's and operator's name and address;

(2) Permittee's and operator's taxpayer identification numbers;

(3) Federal or State permit number and corresponding MSHA number;

(4) Regulatory authority with jurisdiction over the permit; and

(5) Permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure.

33. Revise § 778.13 to read as follows:

§ 778.13 Providing property interest information.

You, the applicant, must provide in the permit application all of the following information for the property to be mined—

(a) The name and address of—

(1) Each legal or equitable owner(s) of record of the surface and mineral.

(2) The holder(s) of record of any leasehold interest.

(3) Any purchaser(s) of record under a real estate contract.

(b) The name and address of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area.

(c) A statement of all interests, options, or pending bids you hold or have made for lands contiguous to the proposed permit area. If you request in writing, we will hold as confidential, under § 773.6(d)(3)(ii) of this chapter, any information you are required to submit under this paragraph which is not on public file under State law.

(d) The Mine Safety and Health Administration (MSHA) numbers for all structures that require MSHA approval.

34. Revise § 778.14 to read as follows:

§ 778.14 Providing violation information.

(a) You, the applicant, must state, in your permit application, whether you, your operator, or any subsidiary, affiliate, or entity which you or your operator own or control or which is under common control with you or your operator, has—

(1) Had a Federal or State permit for surface coal mining operations suspended or revoked during the five-year period preceding the date of submission of the application; or

(2) Forfeited a performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five-year period preceding the date of submission of the application.

(b) For each suspension, revocation, or forfeiture identified under paragraph (a), you must provide a brief explanation of the facts involved, including the—

(1) Permit number.

(2) Date of suspension, revocation, or forfeiture, and, when applicable, the amount of bond or similar security forfeited.

(3) Regulatory authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action.

(4) Current status of the permit, bond, or similar security involved.

(5) Date, location, type, and current status of any administrative or judicial proceedings concerning the suspension, revocation, or forfeiture.

(c) A list of all violation notices you or your operator received for any surface coal mining and reclamation operation during the three-year period preceding the date of submission of the application. In addition you must submit a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that you or your operator own or control on that date. For each violation notice reported, you must include the following information, when applicable—

(1) The permit number and associated MSHA number.

(2) The issue date, identification number, and current status of the violation notice.

(3) The name of the person to whom the violation notice was issued,

(4) The name of the regulatory authority or agency that issued the violation notice.

(5) A brief description of the violation alleged in the notice.

(6) The date, location, type, and current status of any administrative or judicial proceedings concerning the violation notice.

(7) If the abatement period for a violation in a notice of violation issued under § 843.12 of this chapter, or its State regulatory program equivalent, has not expired, certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation.

(8) For all violations not covered by paragraph (c)(7) of this section, the actions taken to abate or correct the violation.

§ 778.21 [Amended]

35. Revise the reference in § 778.21 from ''§ 773.13(a)(1)'' to read ''§ 773.6(a)(1).''

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

36. Revise the authority citation for part 785 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 785.13 [Amended]

37. Revise the reference in § 785.13(c) from ''§ 773.13'' to read ''773.6'' and the reference in the second sentence of § 785.13(h) from ''§ 773.13'' to read ''§ 773.6.''

§ 785.21 [Amended]

38. Revise the reference in the introductory text of § 785.21(e) from ''773.11'' to read ''773.4.''

§ 785.25 [Amended]

39. Revise the reference in the first sentence of § 785.25(a) from ''§ 773.15(b)(4)'' to read ''§ 773.13.''

PART 795—PERMANENT REGULATORY PROGRAM—SMALL OPERATOR ASSISTANCE PROGRAM

40. Revise the authority citation for part 795 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 795.9 [Amended]

41. Revise the reference in the first sentence of § 795.9(d) from ''§ 773.13(d)'' to read ''§ 773.6(d).''

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

42. Revise the authority citation for part 817 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 817.121 [Amended]

43. Revise the reference in the last sentence of § 817.121(g) from ''§ 773.13(d)'' to read ''§ 773.6(d).''

PART 840—STATE REGULATORY AUTHORITY: INSPECTION AND ENFORCEMENT

44. Revise the authority citation for part 840 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, unless otherwise noted.

§ 840.14 [Amended]

45. Revise the reference in § 840.14(b)(2) from ''773.13(d)'' to read ''773.6(d).''

PART 842—FEDERAL INSPECTIONS AND MONITORING

46. Revise the authority citation for part 842 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 842.16 [Amended]

47. Revise the reference in § 842.16(a)(2) from ''§ 773.13(d)'' to read ''§ 773.6(d).''

PART 843—FEDERAL ENFORCEMENT

48. Revise the authority citation for part 843 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 843.5 [Amended]

49. In § 843.5, remove the definition of *Willful violation*.

50. Revise § 843.11(g) to read as follows:

§ 843.11 Cessation orders.

* * * * *

(g) Within 60 days after issuing a cessation order, OSM will notify in writing the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or controller of the operation, as defined in § 701.5 of this chapter.

* * * * *

51. Revise § 843.21 to read as follows:

§ 843.21 Procedures for improvidently issued State permits.

(a) *Initial notice.* If we, OSM, on the basis of any information available to us, including information submitted by any person, have reason to believe that a State-issued permit meets the criteria for an improvidently issued permit under § 773.21 of this chapter, or the State regulatory program equivalent, and the State has failed to take appropriate action on the permit under the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter, we must—

(1) Issue a notice, by certified mail, to the State, to you, the permittee, and to any person providing information under paragraph (a) of this section. The notice will state in writing the reasons for our belief that your permit was improvidently issued. The notice also will request the State to take appropriate action, as specified in paragraph (b) of this section, within 10 days.

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(b) *State response.* Within 10 days after receiving notice under paragraph (a) of this section, the State must demonstrate to us in writing that either—

(1) The permit does not meet the criteria of § 773.21 of this chapter or the State regulatory program equivalent;

(2) The State is in compliance with the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter; or

(3) The State has good cause for not complying with the State regulatory program equivalents of §§ 773.21 through 773.23 of this chapter. For purposes of this section, good cause has the same meaning as in § 842.11(b)(1)(ii)(B)(*4*) of this chapter, except that good cause does not include the lack of State program equivalents of §§ 773.21 through 773.23 of this chapter.

(c) *Notice of Federal inspection.* If we find that the State has failed to make the demonstration required by paragraph (b) of this section, we must initiate a Federal inspection under paragraph (d) of this section to determine if your permit was improvidently issued under the criteria in § 773.21 of this chapter or the State regulatory program equivalent. We must also—

(1) Issue a notice to you and the State by certified mail. The notice will state in writing the reasons for our finding under this section and our intention to initiate a Federal inspection.

(2) Post the notice at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov).

(3) Notify any person who provides information under paragraph (a) of this section that leads to a Federal inspection that he or she may accompany the inspector on any inspection of the minesite.

(d) *Federal inspection and written finding.* No less than 10 days but no more than 30 days after providing notice under paragraph (c) of this section, we will conduct an inspection and make a written finding as to whether your permit was improvidently issued under the criteria in § 773.21 of this chapter. In making that finding, we will consider all available information, including information submitted by you, the State, or any other person. We will post that finding at our office closest to the permit area and on the AVS Office Internet home page (Internet address: http://www.avs.osmre.gov). If we find that your permit was improvidently issued, we must issue a notice to you and the State by certified mail. The notice will state in writing the reasons for our finding under this section.

(e) *Federal enforcement.* If we find that your permit was improvidently issued under paragraph (d) of this section, we must—

(1) Issue a notice of violation to you or your agent consistent with § 843.12(b) of this part and provide opportunity for a public hearing under §§ 843.15 and 843.16.

(2) Issue a cessation order to you or your agent consistent with § 843.11(c), if a notice of violation issued under paragraph (e)(1) is not remedied under paragraph (f) of this section within the abatement period, and provide opportunity for a public hearing under §§ 843.15 and 843.16.

(f) *Remedies to notice of violation or cessation order.* Upon receipt of information from any person concerning a notice of violation or cessation order issued under paragraph (e) of this section, we will review the information and—

(1) Vacate the notice or order if it resulted from an erroneous conclusion under this section; or

(2) Terminate the notice or order if—

(i) The violation has been abated or corrected to the satisfaction of the

agency with jurisdiction over the violation;

(ii) You or your operator no longer own or control the relevant operation;

(iii) The violation is the subject of a good faith administrative or judicial appeal (unless there is an initial judicial decision affirming the violation, and that decision remains in force);

(iv) The violation is the subject of an abatement plan or payment schedule that is being met to the satisfaction of the agency with jurisdiction over the violation; or

(v) You are pursuing a good faith challenge or administrative or judicial appeal of the relevant ownership or control listing or finding (unless there is an initial judicial decision affirming the listing or finding, and that decision remains in force).

(g) *No civil penalty.* We will not assess a civil penalty for a notice of violation issued under this section.

§ 843.24 [Removed]

52. Remove § 843.24.

PART 846–INDIVIDUAL CIVIL PENALTIES

53. Revise the authority citation to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 846.5 [Removed]

54. Remove § 846.5.

55. Add part 847 to read as follows:

PART 847—ALTERNATIVE ENFORCEMENT

Sec.
847.1 Scope.
847.2 General provisions.
847.11 Criminal penalties.
847.16 Civil actions for relief.

Authority: 30 U.S.C. 1201 *et seq.*

§ 847.1 Scope.

This part governs the use of measures provided in sections 518(e), 518(g) and 521(c) of the Act for criminal penalties and civil actions to compel compliance with provisions of the Act.

§ 847.2 General provisions.

(a) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under these provisions, we must update AVS to reflect the judgment or conviction.

(b) The existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted.

(c) Each State regulatory program must include provisions for civil actions and criminal penalties that are no less stringent than those in this part and include the same or similar procedural requirements.

(d) Nothing in this part eliminates or limits any additional enforcement rights or procedures available under Federal or State law.

§ 847.11 Criminal penalties.

Under sections 518(e) and (g) of the Act, we, the regulatory authority, will request the Attorney General to pursue criminal penalties against any person who—

(a) Willfully and knowingly violates a condition of the permit;

(b) Willfully and knowingly fails or refuses to comply with—

(1) Any order issued under section 521 or 526 of the Act; or

(2) Any order incorporated into a final decision issued by the Secretary under the Act (except for those orders specifically excluded under section 518(e) of the Act); or

(c) Knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the regulatory program or any order or decision issued by the Secretary under the Act.

§ 847.16 Civil actions for relief.

(a) Under section 521(c) of the Act, we, the regulatory authority, will request the Attorney General to institute a civil action for relief whenever you, the permittee, or your agent—

(1) Violate or fail or refuse to comply with any order or decision that we issue under the Act or regulatory program;

(2) Interfere with, hinder, or delay us in carrying out the provisions of the Act or its implementing regulations;

(3) Refuse to admit our authorized representatives onto the site of a surface coal mining and reclamation operation;

(4) Refuse to allow our authorized representatives to inspect a surface coal mining and reclamation operation;

(5) Refuse to furnish any information or report that we request under the Act or regulatory program; or

(6) Refuse to allow access to, or copying of, those records that we determine necessary to carry out the provisions of the Act and its implementing regulations.

(b) A civil action for relief includes a permanent or temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which you have your principal office.

(c) Temporary restraining orders will be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended.

(d) Any relief the court grants to enforce an order under paragraph (b) of this section will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting the relief sets aside or modifies the order.

PART 874—GENERAL RECLAMATION REQUIREMENTS

56. Revise the authority citation for part 874 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

57. Revise § 874.16 to read as follows:

§ 874.16 Contractor eligibility.

To receive AML funds, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

PART 875—NONCOAL RECLAMATION

58. Revise the authority citation for part 875 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

59. Revise § 875.20 to read as follows:

§ 875.20 Contractor eligibility.

To receive AML funds for noncoal reclamation, every successful bidder for an AML contract must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or provisionally issued permit to conduct surface coal mining operations.

PART 903—ARIZONA

60. The authority citation for part 903 continues to read as follows:

Authority 30 U.S.C. 1201 *et seq.*

§ 903.773 [Amended]

61. Revise the reference in the second sentence of § 903.773(d)(3) from ''§ 773.13(a)(1)'' to read ''§ 773.6(a)(1).''

62. Revise the reference in § 903.773(g) introductory text from ''§ 773.13(d)'' to read ''§ 773.6(d).''

63. Revise the reference in § 903.773(g)(1) from ''§ 773.13(a)(1)'' to read ''§ 773.6(a)(1).''

64. Revise the reference in § 903.773(g)(2) from ''§ 773.13(a)(1)'' to read ''§ 773.6(a)(1).''

§ 903.774 [Amended]

65. Revise the reference in the first sentence of § 903.774(c) from ''§ 773.13(b) and (c)'' to read ''§ 773.6(b) and (c).''

66. Revise the reference in § 903.774(f)(2) from ''§ 773.13(a)(3)'' to read ''§ 773.6(a)(3).''

PART 905—CALIFORNIA

67. Revise the authority citation for part 905 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 905.773 [Amended]

68. Revise the reference in § 905.773(d)(3) from ''§ 773.13'' to read ''§ 773.6.''

69. Revise the reference in the first sentence of § 905.773(f) from ''§ 773.13(c)'' to read ''§ 773.6(c).''

70. Revise the reference in § 905.773(g) from ''§ 773.13(d)'' to read ''§ 773.6(d).''

§ 905.774 [Amended]

71. Revise the reference in the second sentence of § 905.774(b) from ''773.13(b) and (c)'' to read ''773.6(b) and (c).''

72. Revise the reference in § 905.774(e) from ''§ 773.13(a)(3)'' to read ''§ 773.6(a)(3).''

PART 910—GEORGIA

73. Revise the authority citation for part 910 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 910.773 [Amended]

74. Revise the reference in § 910.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 910.774 [Amended]

75. Revise the reference in § 910.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 912—IDAHO

76. Revise the authority citation for part 912 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 912.773 [Amended]

77. Revise the reference in § 912.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 912.774 [Amended]

78. Revise the reference in § 912.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 921—MASSACHUSETTS

79. Revise the authority citation for part 921 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 921.773 [Amended]

80. Revise the reference in § 921.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 921.774 [Amended]

81. Revise the reference in § 921.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 922—MICHIGAN

82. Revise the authority citation for part 922 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 922.773 [Amended]

83. Revise the reference in § 922.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 922.774 [Amended]

84. Revise the reference in § 922.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 933—NORTH CAROLINA

85. Revise the authority citation for part 933 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 933.773 [Amended]

86. Revise the reference in § 933.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 933.774 [Amended]

87. Revise the reference in § 933.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 937—OREGON

88. Revise the authority citation for part 937 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 937.773 [Amended]

89. Revise the reference in § 937.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 937.774 [Amended]

90. Revise the reference in § 937.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 939—RHODE ISLAND

91. Revise the authority citation for part 939 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 939.773 [Amended]

92. Revise the reference in § 939.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 939.774 [Amended]

93. Revise the reference in § 939.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 941—SOUTH DAKOTA

94. Revise the authority citation for part 941 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 941.773 [Amended]

95. Revise the reference in § 941.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 941.774 [Amended]

96. Revise the reference in § 941.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

PART 942—TENNESSEE

97. Revise the authority citation for part 942 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 942.773 [Amended]

98. Revise the reference in § 942.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

99. Revise the reference in the introductory paragraph of § 942.733(d) from ''§ 773.11(d)(2)'' to read ''§ 773.5(d)(2).''

§ 942.774 [Amended]

100. Revise the reference in the first sentence of § 942.774(c) from ''§ 773.13'' to read ''§§ 773.6.''

PART 947—WASHINGTON

101. Revise the authority citation for part 947 to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 947.773 [Amended]

102. Revise the reference in § 947.773(b)(4) from ''§ 773.13'' to read ''§ 773.6.''

§ 947.774 [Amended]

103. Revise the reference in the first sentence of § 947.774(b)(1) from ''§§ 773.13'' to read ''§§ 773.6.''

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Federal Register

Tuesday,
December 19, 2000

Part IV

Department of Justice

Office of Juvenile Justice and Delinquency Prevention

Comprehensive Program Plan for Fiscal Year 2001; Notice

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and Delinquency Prevention

[OJP (OJJDP)–1297]

Comprehensive Program Plan for Fiscal Year 2001

AGENCY: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Justice.

ACTION: Notice of final program plan for fiscal year 2001.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention is publishing this notice of its Final Program Plan for fiscal year (FY) 2001.

FOR FURTHER INFORMATION CONTACT: Eileen M. Garry, Acting Deputy Administrator, State, Local, and Tribal Grants and Child Protection Division/ Director, Information Dissemination and Planning Unit, at 202–307–0751. [This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is a component of the Office of Justice Programs in the U.S. Department of Justice. Pursuant to the provisions of Section 204 (b)(5)(A) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5601 *et seq.* (JJDP Act), the Acting Administrator of OJJDP published for public comment a Proposed Comprehensive Plan describing the program activities that OJJDP proposed to carry out during fiscal year (FY) 2001 under Parts C and D of Title II of the JJDP Act, codified at 42 U.S.C. 5651–5665a, 5667, 5667a. The public was invited to comment on the Proposed Plan (published on September 26, 2000, at 65 FR 57912) by November 13, 2000. The Acting Administrator analyzed the public comments received, and the comments and OJJDP's responses are provided below. The Acting Administrator took these comments into consideration in developing this Final Comprehensive Plan describing the particular program activities that OJJDP intends to fund during FY 2001, using in whole or in part funds appropriated under Parts C and D of Title II of the JJDP Act.

OJJDP acknowledged in the Proposed Plan that at the time of publication its FY 2001 appropriation was not yet final. OJJDP indicated that depending on the outcome of these legislative actions, it might alter how its programs are structured and make any necessary modifications in the Final Plan following the public comment period. This Final Plan responds to and is consistent with the public comments on the Proposed Plan.

Notice of the official solicitation of grant or cooperative agreement applications for competitive programs to be funded under the Final Comprehensive Plan will be published at a later date in the **Federal Register**. No proposals, concept papers, or other forms of application should be submitted at this time.

Background

In developing its program plan for Parts C and D each year, OJJDP takes into consideration the latest available data on U.S. juvenile crime and victimization and views these statistics in relation to those of recent years. In 1999, the Nation experienced its fifth consecutive year of an unprecedented drop in the rate of juvenile arrests for a violent offense. Violent offenses include murder, forcible rape, robbery, and aggravated assault. These offenses constitute the FBI's Violent Crime Index offenses. The rate of juvenile arrests for these offenses in 1999 was at its lowest level since 1988–36 percent below the peak year of 1994 (compare 339 arrests per 100,000 youth in 1999 versus 512 in 1994 and 327 in 1988). (For more information, see the OJJDP Bulletin *Juvenile Arrests 1999* (in press) by Howard N. Snyder. Copies of this publication and others cited in this Final Program Plan are available from OJJDP's Juvenile Justice Clearinghouse at 800–638–8736 or online at OJJDP's Web site at www.ojjdp.ncjrs.org.)

The rate of youth victimization has followed similar patterns as that of youth offending. From 1973 (when the Bureau of Justice Statistics began collecting victimization statistics) to 1988, the victimization rate for all persons remained fairly stable. Starting in 1988, the rate of victimization for youth ages 12 to 15 and ages 16 to 19 began an unprecedented increase. In that year, the rate for 12- to 15-year-olds was 83.7 per 100,000, and for 16- to 19-year-olds, it was 98.2 per 100,000. By 1994, when the rates peaked, it was 118.6 per 100,000 for 12- to 15-year-olds and 123.9 per 100,00 for 16- to 19-year-olds. In the following 5 years, however, both rates began a precipitous decline, resulting in rates comparable to those of the early 1980's. In 1999, the rate for the younger age group (12–15) was 74.5 per 100,000 and for older juveniles (16–19) was 77.6 per 100,000.

The social conditions facing youth have also changed. According to *America's Children: Key National Indicators of Well-Being 2000,* a publication of the Federal Interagency Forum on Child and Family Statistics, the poverty rate of children dropped to 18 percent in 1998 from its high of 22 percent in 1993. Deaths among adolescents age 15 to 19 continued to decline. In 1997, the mortality rate of this age group was 75 per 100,000, compared with the high of 89 per 100,000 seen in 1991. Declines in deaths from firearm injuries between 1994 and 1997 contributed to this drop. Since 1993, the rate of juvenile violent victimization has decreased from 44 victims per 1,000 juveniles ages 12–17 to 25 per 1,000. This decrease was present for virtually every demographic category.

On the other hand, many negative social indicators have remained at high levels. From 1980 to 1998, the percent of young adults ages 18 to 24 who had completed high school remained relatively flat at 85 percent. The prevalence of heavy drinking among adolescents has remained constant as has the prevalence of regular cigarette smoking. Illegal drug use among 8th, 10th, and 12th grade students has not changed from 1998 to 1999. In fact, although drug use among 12th graders had declined in the 1980's, since 1992, illicit drug use has increased among this population. (For more information, see *America's Children: Key National Indicators of Well-Being 2000.*)

Although the arrest rates for juveniles have dropped, the juvenile justice system still must deal with a very heavy caseload of juvenile offenders. In 1997, the juvenile justice system held 105,790 individuals for offenses in residential facilities throughout the country. Although not strictly comparable to past numbers (because of different data collection methods), this number indicates an increase over the approximately 94,500 offenders held in residential placement in 1995. The Nation's juvenile courts handled 1.76 million delinquency cases in 1997. While this number had remained stable since 1996, it represented a 48-percent increase over the 1988 caseload. In 1997, juvenile courts sentenced 179,800 youth to out-of-home placement and another 645,600 to probation. The proportion of all cases in the courts receiving such dispositions did not change much from 1988 to 1997 (fluctuating mildly in the intervening years). However, by 1997 juvenile courts were sentencing more youth than ever to these dispositions because of the increase in the total number of cases handled. The benefits of a decreased arrest rate have yet to filter through the system to decrease rates of incarceration or probation.

Because of the dramatic changes in juvenile arrests and the state of youth in

the country, concerns about the juvenile justice system have shifted over the past decade. While at the beginning of the 1990's some predicted a plague of violence caused by juveniles, the Nation now faces quite a different situation as a new millennium dawns. Today the challenge is to find solutions to a different set of related issues such as drug dependency, mental health care, and a large residential population of juvenile offenders. The decrease in juvenile arrests is not a signal to become lax in attending to the problems of youth. Instead, it should be considered a sign of encouragement to continue emphasizing the beneficial programs and the effective intervention efforts currently under way.

The causes of the downward trends in juvenile violence are complex. Current research cannot yet say with certainty what combination of programs and social factors led to this decline. However, national statistics and research point to community policing, gun violence prevention programs, gang intervention, school safety efforts, and prevention programs such as mentoring as effective factors in reducing juvenile violence and victimization. OJJDP will continue support of innovative programs, evaluation of these and other programs, research, and national data collection. With the results of these efforts, policymakers and practitioners will be in a better position to make informed choices in their mix of programs and approaches to best serve their communities. Their efforts will help to reinforce the existing trends away from juvenile violence and delinquency, and OJJDP is committed to continuing to support their work.

OJJDP's Final Program Plan for Fiscal Year 2001 focuses on solidifying the gains achieved in reducing the rate of juvenile arrests. It continues to emphasize programs that provide an environment for youth that encourages prosocial development. The Final Program Plan contains research and program evaluation projects that expand an understanding of why the final years of the 1990's were so beneficial for youth. It expands efforts to enhance the capacity of the juvenile justice system as a whole to make the right decisions for youth.

In this Final Comprehensive Plan, OJJDP describes its priorities for funding activities authorized under Part C (National Programs) and Part D (Gang-Free Schools and Communities; Community-Based Gang Intervention) of Title II of the Juvenile Justice and Delinquency Prevention (JJDP) Act. The activities authorized under Parts C and D constitute part, but not all, of OJJDP's overall responsibilities, which are outlined briefly below.

In 1974, the JJDP Act established OJJDP as the Federal agency responsible for providing national leadership, coordination, and resources to develop and implement effective methods to prevent and reduce juvenile delinquency and improve the quality of juvenile justice in the United States. OJJDP administers State Formula Grants under Part B of Title II, State Challenge Grants under Part E of Title II, and Community Prevention Grants under Title V of the JJDP Act to assist States and territories to fund a range of delinquency prevention, control, and juvenile justice system improvement activities. OJJDP provides support activities for these and other programs under statutory set-asides that are used to provide related research, evaluation, statistics, demonstration, and training and technical assistance services.

Under Part C of Title II of the JJDP Act, OJJDP funds Special Emphasis programs and—through its National Institute for Juvenile Justice and Delinquency Prevention—numerous research, evaluation, statistics, demonstration, training and technical assistance, and information dissemination activities. OJJDP funds school and community-based gang prevention, intervention, and suppression programs under Part D and mentoring programs under Part G of Title II of the JJDP Act. OJJDP also coordinates Federal activities related to juvenile justice and delinquency prevention through the Concentration of Federal Efforts Program and serves as the staff agency for the Coordinating Council on Juvenile Justice and Delinquency Prevention; both of these activities are authorized in Part A of Title II of the JJDP Act. Another OJJDP responsibility under the JJDP Act is to administer the Title IV Missing and Exploited Children's Program.

Other programs administered by OJJDP include the Drug Prevention Program, the Enforcing Underage Drinking Laws Program, the Safe Schools Initiative, the Tribal Youth Program, the Safe Start: Children Exposed to Violence Initiative, and the Juvenile Accountability Incentive Block Grants program. OJJDP also administers programs under the Victims of Child Abuse Act of 1990, as amended, 42 U.S.C. 13001 *et seq.*

OJJDP focuses its funding and support activities on the development and implementation of programs with the greatest potential for reducing juvenile delinquency and improving the juvenile justice system by establishing partnerships with State and local governments, American Indian and Alaska Native jurisdictions, and public and private agencies and organizations. OJJDP performs its role of national leadership in juvenile justice and delinquency prevention through a cycle of activities. These include collecting data and statistics to determine the extent and nature of issues affecting juveniles; supporting research studies that can lead to program demonstrations; testing and evaluating demonstration projects; sharing lessons learned from the field with practitioners through a range of information dissemination vehicles; providing seed money to States and local governments through formula and block grants to implement programs, projects, or reform efforts; and providing training and technical assistance to assist States and local governments to implement programs effectively and to maintain the integrity of model programs as they are being replicated.

As noted previously, OJJDP is a component of the Office of Justice Programs (OJP). This Department of Justice agency emphasizes the importance of coordination among its components and with other Federal agencies whenever possible in order to obtain maximum results from OJP programs and initiatives. OJJDP's coordination efforts include joint funding, interagency agreements, and partnerships to develop, implement, and evaluate projects. This Final Program Plan reflects OJJDP's coordination efforts. For a more complete picture of OJP program activities that affect the field of juvenile justice, readers are encouraged to review the Office of Justice Programs Fiscal Year 2001 Program Plan when it becomes available. (Readers should check the OJP Web site at www.ojp.usdoj.gov periodically for an announcement of the availability of the OJP Program Plan.)

Fiscal Year 2001 Program Planning Activities

The OJJDP program planning process for FY 2001 was coordinated with the Acting Assistant Attorney General, Office of Justice Programs, and all OJP components. The program planning process involved the following steps:

- Internal review of existing programs by OJJDP staff.
- Internal review of proposed programs by OJP bureaus and Department of Justice components.
- Review of information and data from OJJDP grantees and contractors.
- Review of information contained in State comprehensive plans.

• Review of comments from youth service providers, juvenile justice practitioners, and researchers who provided input in proposed new program areas.

• Consideration of suggestions made by juvenile justice policymakers concerning State and local needs.

• Consideration of all comments received during the period of public comment on the Proposed Comprehensive Plan.

Discretionary Grant Continuation Policy

OJJDP has listed on the following pages continuation projects currently funded in whole or in part with Part C and Part D funds and eligible for continuation funding in FY 2001, either within an existing project period or through an extension for an additional project or budget period. A grantee's eligibility for continued funding for an additional budget period within an existing project period depends on the grantee's compliance with funding eligibility requirements and achievement of the prior year's objectives. The amount of award is based on prior projections, demonstrated need, and fund availability.

The only projects described in this Final Program Plan are those that are expected to receive Part C or Part D FY 2001 continuation funding under project period or discretionary continuation assistance awards. The Final Program Plan also describes new program areas that OJJDP is considering for new awards under Part C or Part D in FY 2001. This plan does not include descriptions of other OJJDP programs, including mentoring programs under Part G of Title II of the JJDP Act, the Drug Prevention Program, the Enforcing the Underage Drinking Laws Program, the Safe Schools Initiative, the Tribal Youth Program, the Safe Start: Children Exposed to Violence Initiative, and the Juvenile Accountability Incentive Block Grants program. When appropriate, OJJDP issues separate solicitations for applications for funding for these or other programs that are not authorized under Parts C and D. Readers interested in learning about all OJJDP funding opportunities are encouraged to call OJJDP's Juvenile Justice Clearinghouse at 800–638–8736 or visit OJJDP's Web site at www.ojjdp.ncjrs.org and click on ''Grants & Funding.''

Consideration for continuation funding for an additional project period for previously funded discretionary grant programs will be based on several factors, including the following:

• The extent to which the project responds to the applicable requirements of the JJDP Act.

• Responsiveness to OJJDP and Department of Justice FY 2001 program priorities.

• Compliance with performance requirements of prior grant years.

• Compliance with fiscal and regulatory requirements.

• Compliance with any special conditions of the award.

• Availability of funds (based on appropriations and program priority determinations).

In accordance with Section 262 (d)(1)(B) of the JJDP Act, as amended, 42 U.S.C. § 5665a, the competitive process for the award of Part C funds is not required if the (Acting) Administrator makes a written determination waiving the competitive process:

1. With respect to programs to be carried out in areas in which the President declares under the Robert T. Stafford Disaster Relief and Emergency Assistance Act codified at 42 U.S.C. § 5121 *et seq.* that a major disaster or emergency exists, or

2. With respect to a particular program described in Part C that is uniquely qualified.

Summary of Public Comments on the Proposed Comprehensive Plan for Fiscal Year 2001

OJJDP published its Proposed Comprehensive Plan for FY 2001 in the **Federal Register** (Vol. 65, No. 187) on September 26, 2000, for a 45-day public comment period. OJJDP received six letters commenting on the Proposed Plan. Each letter had just one signature. These comments have been considered in the development of OJJDP's Final Comprehensive Plan for Fiscal Year 2001.

All comments received are summarized below together with OJJDP's responses. To avoid needless repetition in this summary, all comments on a particular program or area of programming are summarized in one comment paragraph and followed by a single OJJDP response, which applies to all the comments on that topic.

Comment: Two individuals commented on the sixth area of new programming (''Studying Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)'') in the Proposed Program Plan. One writer, a scientist associated with a school of medicine, endorsed OJJDP's proposal to support studies to assess the rate of FAS and FAE in youth in the juvenile justice system, to determine what services are available, to develop screening and individualized case management, and to plan to better serve youth affected by FAS/FAE. He stressed the importance of this issue, stating that ''it is not yet clear how these deficits may affect an individual's disposition to delinquency and other high risk behaviors.'' The writer, who has spent more than 16 years studying fetal alcohol effects, indicated that there is need for an objective and comprehensive assessment of this situation. The second commenter, a university professor with more than 20 years' experience in research on FAS, referred to the ''devastating effects'' of prenatal alcohol exposure and the importance and timeliness of efforts to determine the influence of prenatal alcohol on the juvenile justice system.

Response: OJJDP appreciates the writers' thoughtful comments on the issues involved in Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) and their support for OJJDP's proposal to include research in this area as part of its new programming for FY 2001. As the first writer noted, although the deficits associated with FAS and FAE would appear to predispose individuals to delinquent and criminal behavior, the relevant data to support this connection do not yet exist. The best research in this area is perhaps the work of Anne Streissguth, who followed 415 individuals with FAS or FAE for over 20 years. Fourteen percent of her subjects between the ages of 6 and 11 and 61 percent of adolescents had been in trouble with the law at least once. It is also correct, as one writer noted, that traditional juvenile justice system programs are not designed to serve this population. If it is, in fact, determined that a significant number of youth with FAS/FAE are involved with the juvenile justice system, OJJDP will need to conduct subsequent studies to discover what intervention and treatment strategies are most appropriate and effective for this population.

Comment: A policy analyst wrote to comment on the third new program area (''Preparing Juvenile Offenders for Reentry Into Their Communities'') in the Proposed Program Plan. She suggested that OJJDP should consider including youth with developmental and learning disabilities in addition to youth with mental illness and substance abuse in the reference to OJJDP's ''proposing to expand its work on juvenile aftercare services to target specialized populations such as adolescent female offenders, minority youth, and juvenile offenders with mental health and substance abuse problems * * *'' She also recommended that OJJDP include an

evaluation of each of this new program area's three components (computer networking instruction, model correctional education program, and expansion of aftercare services).

Response: In the third area for possible new programming in fiscal year 2001, ''Preparing Juvenile Offenders for Reentry Into Their Communities,'' OJJDP proposed, among other actions, to expand its work on aftercare services ''to target specialized populations such as adolescent female offenders, minority youth, and juvenile offenders with mental health and substance abuse problems.'' The writer suggests that OJJDP consider including youth with developmental and learning disabilities, whom she described as being ''at risk for dropping out of school, unemployment, and other indicators of unsuccessful community reentry.'' OJJDP agrees that these youth constitute a specialized population that also needs additional aftercare/reentry resources. Therefore, the list of specialized populations in the third area under ''New Programs'' now includes ''youth with disabilities.'' Another new population, ''juvenile sex offenders,'' has also been added to the list.

OJJDP is currently supporting development of a clearinghouse for disseminating information about aftercare/reentry services and a consultant pool to provide training and technical assistance to juvenile justice practitioners throughout the country under a grant with the Johns Hopkins University, Institute for Policy Studies. In addition, OJJDP is collaborating with the U.S. Department of Education's Office of Special Education in a 5-year initiative to develop and support a National Center on Education, Disability, and Juvenile Justice. This center is a collaborative research, training, technical assistance, and dissemination program designed to develop more effective responses to the needs of youth with disabilities in the juvenile justice system or those at risk for involvement with the juvenile justice system. The current grantee is the University of Maryland at College Park, with partners at American Institutes of Research, Arizona State University, the PACER Parent Advocacy Center, and the University of Kentucky. More information about the center is available on its Web site at *www.edjj.org.*

The writer also suggested that OJJDP evaluate each component of this proposed new program area. Although OJJDP has not yet identified specific programs and evaluations to be funded in FY 2001, an evaluation component is built into each new demonstration initiative, whenever feasible. OJJDP is committed to identifying and ultimately supporting programs that are effective in reducing and preventing delinquency. Without well-designed evaluations, it is impossible to identify objectively what works and what programs merit OJJDP's funding support.

Comment: The principal in a not-for-profit technical assistance group focusing on juvenile justice programming issues praised the breadth of innovation in the ''New Programs'' priority areas, such as juvenile sex offending, Fetal Alcohol Syndrome, and assistance to families navigating the juvenile justice system. The writer also recommended that OJJDP ''look closely at Illinois and the programs of its community-based organizations for excellent models'' of ''best practices'' approaches to the needs of status offenders. In addition, she proposed a concept for engaging community-based organizations in the delivery of services.

Response: OJJDP appreciates the writer's recognition of the innovation in the proposed new program areas. In regard to the concept of engaging community-based organizations in the delivery of services for the serious offender, OJJDP finds it a sound idea that holds great promise and may be appropriate for many youth in lieu of out-of-home placement and for those who are returning to their communities after being placed in secure facilities.

At a recent meeting in Austin, TX, the Case Foundation brought together leaders of more than two dozen community youth-serving agencies that are part of a growing movement to provide the kind of support to juvenile offenders that the writer described. OJJDP staff participated in the meeting in an effort to learn as much as possible about how best to link the broad range of services such as those referred to in this letter of public comment.

Although the Program Plan does not include a specific program such as the writer suggested, OJJDP hopes that resources will permit funding a field-initiated demonstration program. Under this program, a community-based organization could apply for funds to support such an effort. An evaluation component would be required in any such proposal.

Comment: The writer, director of a State juvenile justice agency, wrote in support of the 12 new program areas in the Proposed Program Plan, particularly the focus on family advocacy as the top priority. She recommended that OJJDP raise the priority for the ninth proposed new program area, ''Increasing the Capacity and Effectiveness of Juvenile Probation.'' The writer also observed that ''probation officers must function as case managers in the sense of developing plans for services that align juveniles and families with resources to meet their diverse needs' and suggested that any curriculum developed for in-service training cover this area of responsibility.

Response: OJJDP appreciates the writer's support for the proposed new program areas. OJJDP agrees that the proposed new program area that addresses the capacity and effectiveness of juvenile probation is of great importance and concurs in the writer's observation that, because ''probation officers must function as case managers in the sense of developing plans for services that align juveniles and families with resources to meet their diverse needs,'' any curriculum developed for in-service training should cover this area of responsibility.

Comment: An official of the American Psychological Association (APA) wrote to support the overall Proposed Program Plan and specifically to commend the emphasis on prevention and early intervention and on areas such as special needs populations, bullying prevention, cultural sensitivity and competency, and family strengthening and support. He also praised OJJDP's ''recognition that one of today's most significant challenges is finding ways to address mental health needs of youth in the juvenile justice system.'' The commenter identified four of OJJDP's 12 proposed new program areas as priorities: Addressing the Problem of Juvenile Sex Offenders; Helping Youth and Families Prevent Violence; Supporting Field-Initiated Research, Demonstration, and Evaluation Programs; and Integrating Culturally Sensitive and Culturally Competent Strategies To Prevent Disproportionate Minority Confinement. He then provided several suggestions for text to be inserted in the Final Program Plan.

Response: OJJDP appreciates the APA's support for the plan in general and for specific parts of the plan. In regard to mental health issues, OJJDP has been actively engaged for several years in identifying and addressing the pressing mental health needs of juveniles in the justice system. It is, however, obvious that much more work is needed. That is why the Program Plan for FY 2001 reflects a serious commitment to that aspect of delinquency prevention and treatment. In deciding on new programs for funding in FY 2001, OJJDP will give careful consideration to APA's choice of the top four priorities for new program areas.

OJJDP has summarized each of the writer's suggestions for specific new text and provided our responses below. (Page numbers at the end of each comment refer to the **Federal Register** of September 26, 2000.)

Suggestion: Add ''including those with mental health needs'' at the end of the second goal (p. 57914).

Response: The goal as stated is meant to include all ''juvenile delinquents, status offenders, and dependent, neglected, and abused children.'' Adding one specific category would imply exclusion of other categories. Therefore, this change was not made.

Suggestion: Add ''that provide developmentally appropriate, culturally competent mental health and other critical services'' to the end of the third goal (p. 57914).

Response: OJJDP agrees with the thrust of this statement but again believes that it is unnecessary to be this specific in the goal statement.

Suggestion: Add ''mental health and other'' after the words ''meet the'' on line 7 of the fourth goal (p. 57914).

Response: OJJDP agrees that the mental health and other needs of dependent, neglected, and abused children should be met but prefers to keep the statement broad (''meet the needs'') rather than prioritizing one need over others.

Suggestion: Add ''including educational and mental health needs'' directly after ''child's needs'' in line 8 of new program area 1 (p. 57915).

Response: OJJDP agrees that educational and mental health needs are important but, again, prefers to keep the statement broad.

Suggestion: Add ''appropriate'' before ''services'' in line 8 of new program area 1 (p. 57915).

Response: As written, the ''services'' are described as those ''that can assist children and their families meet their needs.'' The word ''appropriate'' is unnecessary, since presumably only appropriate services would ''assist children and their families meet their needs.''

Suggestion: Add ''youth with disabilities and gay, lesbian, and bisexual youth'' to the targeted specialized population in line 26 of new program area 3 (p. 57915).

Response: OJJDP has added ''youth with disabilities'' and also added ''juvenile sex offenders,'' based on an internal OJJDP recommendation. OJJDP recognizes, however, that there may be additional specialized populations that need to be targeted by juvenile aftercare services. The groups listed in the Proposed Program Plan—plus those added to this Final Plan—are ones whose needs have been widely noted or documented. As written in the Proposed Program Plan, the text read: ''OJJDP is also proposing to expand its work on juvenile aftercare services to target specialized populations such as [italics added] adolescent female offenders, minority youth, and juvenile offenders with mental health and substance abuse problems * * *'' The Final Plan includes ''youth with disabilities'' and ''juvenile sex offenders.'' It is possible that other special populations could be added to this list in the future.

Suggestion: Add ''and they may be displaying early signs of behavioral disorders'' directly after ''behavior'' in line 11 of new program area 5 (p. 57915).

Response: OJJDP has inserted the recommended language in this Final Plan.

Suggestion: Add ''and evaluation of'' directly after ''development'' in the phrase ''development of a probation officer curriculum'' in line 11 of new program area 9 (p. 57916).

Response: All training curriculums funded by OJJDP must meet the evaluation protocols established by its Training and Technical Assistance Division. These evaluation criteria include assessments of participant learning related to training outcomes and performance objectives, the effectiveness of the training design, and the effectiveness of training delivery. Thus, there is no need to add ''and evaluation of'' to the text of new program area 9, ''Increasing the Capacity and Effectiveness of Juvenile Probation.''

Introduction to Fiscal Year 2001 Program Plan

In administering the discretionary grants program under Parts C and D of Title II, OJJDP has identified four goals as the major elements of a sound policy that ensures public safety and security while establishing effective juvenile justice and delinquency prevention programs. Achieving these goals, which are discussed below, is vital to protecting the long-term safety of the public from juvenile delinquency and violence.

- OJJDP promotes *delinquency prevention and early intervention* efforts that reduce the flow of juvenile offenders into the juvenile justice system, the numbers of serious and violent offenders, and the development of chronic delinquent careers. While removing serious and violent juvenile offenders from the street serves to protect the public, long-term solutions lie primarily in taking aggressive steps to stop delinquency before it starts or becomes a pattern of behavior.
- OJJDP seeks to *improve the juvenile justice system* and the response of the system to juvenile delinquents, status offenders, and dependent, neglected, and abused children.
- OJJDP supports efforts in the area of *corrections, detention, and community-based alternatives* to preserve the public safety in a manner that serves the appropriate development and best use of secure detention and corrections options, while at the same time fostering the use of community-based programs for juvenile offenders.
- OJJDP seeks to *support law enforcement, public safety, and other justice agency efforts* to prevent juvenile delinquency, intervene in the development of chronic delinquent careers, and collaborate with the juvenile justice system to meet the needs of dependent, neglected, and abused children.

In 1993, OJJDP published its *Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders,* which set forth a research-based comprehensive approach for addressing the problems of juvenile crime and victimization and for achieving its program goals. The Comprehensive Strategy was developed to assist States and local communities in preventing at-risk youth from becoming serious, violent, and chronic juvenile offenders and in crafting a practical response to those who do. Since 1995, OJJDP has utilized the *Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders,* developed in partnership with consultant experts in the fields of prevention and graduated sanctions, which has been the blueprint for providing training and technical assistance to over 40 local communities in 8 States in the development of local strategic plans based on the Comprehensive Strategy. This comprehensive strategic planning process involves a systematic method that utilizes data and research-based best practices and programs to fill identified gaps in services to youth and families. The desired product of this planning effort is a 5-year strategic plan supported by all the stakeholders within that community. The lessons learned from the Federal, State, and local partnerships developed through the Comprehensive Strategy Training and Technical Assistance Initiative are currently enhancing the well-being of the children and families in many of those communities and are assisting OJJDP in providing guidance and direction to many other State agencies

and local jurisdictions seeking assistance in the development of this strategic planning approach designed to prevent, reduce, and control juvenile delinquency.

This Final Plan also supports the Coordinating Council's 1996 National Juvenile Justice Action Plan, which grew out of the Comprehensive Strategy. This Action Plan, which the Coordinating Council is currently updating, provides eight objectives designed to reduce juvenile violence and describes ways to meet these objectives. Together, the Comprehensive Strategy and the Action Plan constitute a sound strategy for translating innovation and research findings to infrastructure.

Continuation Programs

OJJDP organizes its programs under four broad categories that reflect its program goals and the principles of the Comprehensive Strategy. These categories are Public Safety and Law Enforcement, Delinquency Prevention and Intervention, Strengthening the Juvenile Justice System, and Child Abuse and Neglect and Dependency Courts. An additional category (Overarching) contains programs with significant elements common to more than one of the other four categories. Descriptions of the specific programs in each of the five categories appear after the discussion of new programs below.

New Programs

Because the FY 2001 Proposed Comprehensive Plan was published prior to the enactment of the FY 2001 appropriation, possible new programs in 12 broad subject areas were outlined. The public was asked to comment on the proposed new programs, which are described briefly below, and to suggest additional priority areas for funding consideration.

1. Helping Families Navigate the Juvenile Justice System

OJJDP proposes to support a range of advocacy services for families designed to help them understand and navigate the juvenile justice system, learning how they can appropriately and productively interact with the various entities in the system to meet their child's needs. Referral to services that can assist children and their families meet their needs would also be an important component of this effort. Possible approaches to be considered include support to private organizations that have experience in working with non-English-speaking families or providing advocacy and support for parenting networks in the community.

2. Addressing the Problem of Juvenile Sex Offending

This program area was identified in the FY 2000 Program Plan and was included again in the Proposed FY 2001 Program Plan because of the many requests from the juvenile justice field and the public for information on effective sex offender treatment programs and model community responses to prevent sexual victimization. OJJDP is considering support for evaluations of treatment models for juvenile sex offenders that are currently in use. In addition, OJJDP is considering a study that examines the effects of State registration and notification legislation on juvenile sex offenders. This work would build upon the development of a juvenile sex offender typology currently being funded by OJJDP. It will also respond to the needs of practitioners and policymakers by increasing the accessibility and strategic use of accurate information about the nature, extent, and impact of juvenile sex offending through a training, technical assistance, and information dissemination program to be funded in FY 2001.

3. Preparing Juvenile Offenders for Reentry Into Their Communities

OJJDP proposes to develop several programs designed to facilitate juvenile offenders' reentry into the community from out-of-home placements. Two of these would focus specifically on improving education and training resources within correctional facilities. The first would teach juveniles to design, build, and maintain computer networks through Cisco Systems' Cisco Networking Academy Program. The second would develop and implement a pilot demonstration of a model correctional education program in both a juvenile detention facility and a correctional facility. The latter project would be an extension of prior work funded by OJJDP to provide assistance in addressing the literacy needs of juvenile offenders. OJJDP is also proposing to expand its work on juvenile aftercare services to target specialized populations such as adolescent female offenders, minority youth, juvenile offenders with mental health and substance abuse problems, youth with disabilities, and juvenile sex offenders and to assess the lessons learned about institutional programming for serious and violent juvenile offenders.

4. Helping Youth and Families Prevent Violence

OJJDP proposes to expand its violence prevention activities by focusing on children who can be taught peaceful ways of resolving problems, families who can be counseled regarding violence prevention, and teachers who must effectively manage their classrooms. One proposed project would develop violence prevention protocols for pediatricians similar to those developed around unintentional injuries such as motor vehicle accidents. This project would respond to the need to address homicide and other injuries caused by interpersonal violence. Children must also be taught to avoid violence, and OJJDP proposes to expand its work on bullying prevention by providing training and technical assistance to schools to implement the highly successful and proven program of Dr. Dan Olweus, the Principal Investigator who developed, refined, and systematically evaluated the Bullying Prevention Program in Norway. The program is one of the Blueprints for Violence Prevention (see the Blueprints program description below, under the Strengthening the Juvenile Justice System category of programs). OJJDP is also considering expanding training and technical assistance resources to new teachers in effective classroom and conflict management. From lessons learned in North Carolina, OJJDP would focus on changing practices in colleges of education and State boards of education, which have responsibility to create and manage the training of new teachers.

5. Assessing and Meeting the Needs of Status Offenders and Other Youth Upon Initial Contact With the Juvenile Justice System

OJJDP is proposing to fund a program that would identify the best practices and programs from around the country that are effective in dealing with such status offenses as truancy, running away, curfew violations, alcohol possession and use, and incorrigibility. Juveniles who commit status offenses may be taking a first step into the juvenile justice system that will escalate into delinquent behavior and they may be displaying early signs of behavioral disorders. Prevention and treatment through early intervention at this stage have proven to be less expensive and more effective than efforts to change subsequent delinquent behavior.

OJJDP is also considering expanded support for two existing programs that address the needs of youth when they

first come to the attention of law enforcement. One program would provide guidelines, materials, training, and technical assistance to the two currently funded Community Assessment Centers. These Centers operate as a single point of entry into the juvenile justice and the youth services systems, provide immediate and comprehensive assessment and integrated case management, and operate an appropriate management information system (MIS). OJJDP is also proposing to expand support for the Child Development-Community Policing model to support program implementation in the current replication sites. These ongoing collaborations between law enforcement and mental health professionals are designed to better address children's exposure to violence, which has been shown to be a risk factor for future problem behaviors.

6. Studying Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) as Risk Factors for Delinquency

Fetal Alcohol Syndrome and Fetal Alcohol Effects (FAS/FAE) are associated with a specific set of neurobehavioral deficits that predispose affected individuals to delinquent and other high-risk behaviors. A significant percentage of youth in detention and secure corrections may be affected by undiagnosed FAS/FAE. Traditional juvenile justice system programs are not designed to serve this population, and youth with FAS/FAE, once involved with the juvenile justice system, are likely to experience a high rate of recidivism. OJJDP proposes to support a study to assess the rate of FAS/FAE youth within the juvenile justice system, determine what services are available, and develop screening and individualized case management and planning to better serve youth affected by FAS/FAE.

7. Supporting Field-Initiated Research, Demonstration, and Evaluation Programs

OJJDP proposes to support field-initiated research, demonstration, and evaluation projects that have the potential to provide valuable information to policymakers and practitioners, complement the new and current programs outlined in this Program Plan, and support OJJDP's mission in significant and creative ways. Topics explored in past OJJDP-funded field-initiated research include mental health issues in the juvenile justice system; juvenile justice system operations, sanctions, and treatments; programs for at-risk and female juvenile offenders; and delinquency prevention.

8. Expanding the Use of Cost-Benefit Analyses

OJJDP is interested in expanding the uses of cost-benefit analyses in juvenile justice. Up to now, their use has been limited to select States or localities. As a first step to promoting the greater use of this method for assessing programs, OJJDP would convene a group of experts in the fields of policy analysis, economics, and juvenile justice to determine how cost-benefit analyses can best be used for juvenile justice policy analysis. Following the development of a set of recommended analyses, OJDDP would support the development of a guide containing information on methodology, data collection instruments, and a set of standard cost estimates.

9. Increasing the Capacity and Effectiveness of Juvenile Probation

Despite the acknowledgment that probation is the ''workhorse'' of the juvenile justice system and many courts are dependent upon probation officers to assist them by recommending appropriate dispositions in juvenile cases, probation officers often receive only limited training before assuming their important roles and scant in-service training opportunities. OJJDP proposes to fund the development of a probation officer curriculum and to provide limited technical assistance to juvenile probation officers and their agencies. One training curriculum would be for supervisory staff, a second one for field officers.

10. Understanding Youth Gangs in Chronic Gang Cities

OJJDP proposes to combine multiple state-of-the-art methods for understanding youth gangs through a single coordinated research project in two or more large population, chronic gang cities. The study would focus on comparing gangs representing multiple racial/ethnic groups (e.g., predominately African American, Hispanic, Asian, White, American Indian, or mixed). Research questions would include how different ethnic gangs vary in gang structure and group processes, what factors predict peaks and valleys in gang offending across each of the ethnic groups over time, and what prevention, intervention, and suppression approaches are most appropriate to respond to ethnic variations across a chronic gang city. Some of the methodological approaches that would be employed include analysis of incident-level law enforcement data, crime and resource mapping systems, school risk-factor surveys, qualitative field studies, and gang member interviews.

11. Integrating Culturally Sensitive and Culturally Competent Strategies To Prevent Disproportionate Minority Confinement

OJJDP proposes to identify current best practices and provide specialized training and technical assistance to assist States in their efforts to address disproportionate minority confinement. While many program managers have made the initial step of broadening existing programming by hiring minority staff, a comprehensive approach to culturally sensitive and competent programming is needed. Experts in the field of culturally competent program design and implementation would provide targeted support to assist States in broadening the scope of current delinquency prevention programs. This initiative would provide a critical tool in the implementation of States' compliance with the disproportionate minority confinement core protection.

12. Expanding the Comprehensive Strategy Program

Recognizing the success of the research-based Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders since its inception in 1993, this project would promote the expansion of the Comprehensive Strategy Program by supporting planning and implementation in up to eight new States and/or localities. In addition, this project would support the development or refinement of management information systems in communities developing or implementing the Comprehensive Strategy Program.

Fiscal Year 2001 Programs

The programs that OJJDP will fund in FY 2001 are listed alphabetically and summarized within each of the five categories mentioned previously: Overarching, Public Safety and Law Enforcement, Strengthening the Juvenile Justice System, Delinquency Prevention and Intervention, and Child Abuse and Neglect and Dependency Courts.

With regard to implementation sites and other descriptive data and information, program priorities within each category will be determined based on grantee performance, application quality, fund availability, and other factors.

As part of the FY 2001 appropriations process, Congress is likely to identify a number of programs for priority funding

consideration by OJJDP with regard to the grantee(s) and the amount of funds. These programs are not included in the Program Plan because Congress has not completed action on the FY 2001 budget for the Department of Justice (as of the date this Final Plan was submitted to the **Federal Register** for publication). Consequently, OJJDP is not able to determine which proposed programs, either new or continuation, will be funded in FY 2001. However, it is apparent from the public comments received that there is broad general agreement with the priorities proposed and no disagreement with any specific proposed new funding area or continuation program. While, generally speaking, continuation programs take priority over new programs, OJJDP hopes to start or expand programs in each of the proposed new funding areas, even if appropriations do not support significant investment in these new program priorities in FY 2001.

Fiscal Year 2001 Program Listing

Overarching

Coalition for Juvenile Justice
Insular Area Support
Juvenile Justice Clearinghouse
Juvenile Justice Statistics and Systems Development Program
National Resource Center for Safe Schools
National Training and Technical Assistance Center
OJJDP Management Evaluation Contract
OJJDP Technical Assistance Support Contract—Juvenile Justice Resource Center
Program of Research on the Causes and Correlates of Delinquency
SafeFutures: Partnerships To Reduce Youth Violence and Delinquency
Technical Assistance for State Legislatures
Telecommunications Assistance
Training and Technical Assistance Coordination for the SafeFutures Initiative

Public Safety and Law Enforcement

Evaluation of the Comprehensive Community-Wide Approach to Gang Prevention, Intervention, and Suppression Program
Evaluation of the Partnerships To Reduce Juvenile Gun Violence Program
Evaluation of the Rural Gang Initiative
Evaluation of the Transfer of Responsibility for Child Protective Investigations to Law Enforcement Agencies
Gang Prevention Through Targeted Outreach (Boys & Girls Clubs)
Juvenile Justice Law Enforcement Training and Technical Assistance Program
Mesa Gang Intervention Project (MGIP)
National Youth Gang Center
Rural Gang Initiative Demonstration Sites
Technical Assistance to the Gang-Free Schools and Communities Initiatives

Delinquency Prevention and Intervention

Assessing Alcohol, Drug, and Mental (ADM) Disorders Among Juvenile Detainees
The Chicago Project for Violence Prevention
Communities in Schools
Diffusion of State Risk- and Protective-Factor-Focused Prevention
Do the Write Thing Challenge Program
Evaluation of the Truancy Reduction Demonstration Program
Intergenerational Transmission of Antisocial Behavior
Investing in Youth for a Safer Future—A Public Education Campaign
Multisite, Multimodal Treatment Study of Children With Attention Deficit/Hyperactivity Disorder
Risk Reduction Via Promotion of Youth Development
Strengthening Services for Chemically Involved Children, Youth, and Families
Study of the Marketing of Age-Restricted Violent Entertainment to Children
Technical Assistance for Community Prevention Programs—Title V
Truancy Reduction Demonstration Program

Strengthening the Juvenile Justice System

Balanced and Restorative Justice (BARJ) Training Project
Blueprints for Violence Prevention: Training and Technical Assistance
Building Blocks for Youth
Census of Juveniles in Residential Placement
Center for Students With Disabilities in the Juvenile Justice System
Comprehensive Children and Families Mental Health Training and Technical Assistance
Connecticut/Cook County (IL) Girls Collaborative
Development of the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders
Evaluation of the Department of Labor's Education and Training for Youthful Offenders Initiative
Evaluation of the Performance-Based Standards Project
Evaluation of SafeFutures
Juvenile Defender Training, Technical Assistance, and Resource Center
The Juvenile Justice Prosecution Unit
Juvenile Residential Facility Census
Longitudinal Study To Examine the Development of Conduct Disorder in Girls
National Juvenile Justice Data Analysis Project
National Juvenile Justice Program Directory
The National Longitudinal Survey of Youth 97
Performance-Based Standards for Juvenile Correction and Detention Facilities
Study Group on Very Young Offenders
Systems Improvement Training and Technical Assistance
Survey of Juvenile Probation
Technical Assistance to Native American Tribes and Alaskan Native Communities
TeenSupreme Career Preparation Initiative

Child Abuse and Neglect and Dependency Courts

National Evaluation of the Safe Kids/Safe Streets Program
Safe Kids/Safe Streets: Community Approaches to Reducing Abuse and Neglect and Preventing Delinquency

Overarching

Coalition for Juvenile Justice

This project supports the Coalition for Juvenile Justice, an organization composed of member representatives of State Advisory Groups appointed by State Governors under section 223(a)(3) of the JJDP Act to establish policies and priorities for the Formula Grants program. Pursuant to statutory requirements, the Coalition will: conduct an annual conference of member representatives; disseminate information on data, standards, advanced techniques, and program models developed and funded by OJJDP; offer training on how to work with the media on juvenile justice issues; review Federal policies regarding juvenile justice and delinquency prevention; advise the Administrator with respect to the work of OJJDP; and advise the President and Congress with regard to State perspectives on the operation of the Office and Federal legislation pertaining to juvenile justice and delinquency prevention.

This project will be implemented by the current grantee, the Coalition for Juvenile Justice. No additional applications will be solicited in FY 2001.

Insular Area Support

The purpose of this statutorily required program is to provide support

to the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Funds are available to address the special needs and problems of juvenile delinquency in these insular areas, as specified by Section 261(e) of the JJDP Act of 1974, as amended, 42 U.S.C. 5665(e).

Juvenile Justice Clearinghouse

A component of the National Criminal Justice Reference Service (NCJRS), the Juvenile Justice Clearinghouse (JJC) collects, synthesizes, and disseminates information on all aspects of juvenile justice. OJJDP established the Clearinghouse in 1979 to serve the juvenile justice community, legislators, the media, and the public. JJC offers toll-free telephone access to information; prepares specialized responses to information requests; produces, warehouses, and distributes OJJDP publications; exhibits at national conferences; maintains a comprehensive juvenile justice library and database; and administers several electronic information resources. NCJRS is administered by the National Institute of Justice (NIJ) under a competitively awarded contract to Aspen Systems Corporation.

This program will be implemented by the current contractor, Aspen Systems Corporation. No additional applications will be solicited in FY 2001.

Juvenile Justice Statistics and Systems Development Program

The Juvenile Justice Statistics and Systems Development (SSD) Program was competitively awarded in 1990 to the National Center for Juvenile Justice (NCJJ) to improve national, State, and local statistics on juveniles as victims and offenders. The SSD project has traditionally consisted of three tracks of work: National Statistics, Dissemination, and Systems Development. In FY 2001, NCJJ will continue many activities under the first two tracks, including maintaining an extensive library of data files, producing Easy Access software packages and the Web-based OJJDP Statistical Briefing Book, and continuing to service requests for juvenile justice information. In FY 2000, additional funding from OJJDP allowed NCJJ to enhance activities under the Systems Development track of the project. This work continue with FY 2001 funding.

To meet the challenge of managing the cases of youth within their jurisdiction effectively and efficiently, juvenile court administrators and judges need ready access to information that will support the operation, management, and decisionmaking of the full-service juvenile court system. Knowledge-based decisionmaking (which should be the hallmark of every juvenile justice system) requires not just the collection of data but the collaboration of the community leaders who will give meaning to the data. This was the focus of the recently released book *Juvenile Justice With Eyes Open,* published in FY 2000 as part of the Statistics and Systems Development Project (Systems Development Track). Also in FY 2000, NCJJ used the principles outlined in this publication to develop and field-test an approach that local jurisdictions can employ to systematically identify and fulfill their local information needs. This includes training local juvenile justice leaders in the rational decisionmaking model (RDM) as a design tool for management information systems; developing data specifications for an effective information system to meet operational, management, and research needs; identifying data needs from collateral service providers and data that will be of use to collaterals; and modeling agreements and protocols with collateral service providers to share case-level and/or aggregate data. Field-testing will continue in FY 2001.

This project will be implemented by the current grantee, the National Center for Juvenile Justice. No additional applications will be solicited in FY 2001.

National Resource Center for Safe Schools

Since 1984, OJJDP and the U.S. Department of Education have provided joint funding to promote safe schools. This work has focused national attention on cooperative solutions to problems that disrupt the educational process. Because an estimated 3 million incidents of crime occur in America's schools each year, it is clear that this problem continues to plague many schools, threatening students' safety and undermining the learning environment. With FY 1998 funding, the U.S. Department of Education's Safe and Drug-Free Schools Program and OJJDP established the National Resource Center for Safe Schools for a 3-year project period. This project expanded the scope and provision of previous training and technical assistance to communities and school districts across the country. The grantee is working to help schools develop and put in place comprehensive safe school plans. It does this by providing onsite training and consultation to schools and communities, creating and distributing resource materials and tools, providing Web-based information services, and partnering with State-level agencies to build State capacity to assist local education agencies. Through the inclusion on the project's Advisory Committee of representatives of Hamilton Fish National Institute on School and Community Violence and other school-related training and technical assistance providers, this project has developed training materials and information resources based on the latest research findings on effective programs and best practices.

The grantee provided information, training, and/or technical assistance to more than 7,000 recipients. In addition, the grantee developed a curriculum for comprehensive school planning, trained six school districts in South Carolina, conducted two regional conferences, issued and distributed a quarterly newsletter, and convened a national Advisory Committee Meeting.

During FY 2001, the National Resource Center for Safe Schools will—

- Prepare and distribute topical fact sheets and case studies.
- Provide training to a national network of trainees through ''training of trainers.''
- Conduct regional conferences on safe school topics.
- Provide tailored onsite training and technical assistance.

A new solicitation will be issued and a grant awarded through a competitive process in FY 2001.

National Training and Technical Assistance Center

The National Juvenile Justice and Delinquency Prevention Training and Technical Assistance Center (NTTAC) was established in FY 1995 under a competitive 3-year project period award. NTTAC serves as a national training and technical assistance repository, inventorying and coordinating the integrated delivery of juvenile justice training and technical assistance resources and establishing a database of these resources. NTTAC convened the first in a series of annual OJJDP training and technical assistance grantee-contractor meetings that are used for sharing of information, development of policies, and collaboration and coordination of efforts. NTTAC's funding in FY 1996 provided services in the form of coordinated technical assistance support for OJJDP's SafeFutures and gang program initiatives, continued promotion of collaboration between OJJDP training and technical assistance providers, developed training and technical assistance materials, and completed and disseminated the first OJJDP *Training*

and Technical Assistance Resource Catalog.

In FY 1997, NTTAC disseminated a second, updated *Training and Technical Assistance Resource Catalog;* created a Web site for the Center and a ListServ for the Children, Youth and Affinity Group; held three focus groups on needs assessments; and coordinated and provided 38 instances of technical assistance in conjunction with OJJDP's training and technical assistance grantees and contractors. In FY 1998, NTTAC finalized the jurisdictional team training and technical assistance packages on critical needs in the juvenile justice system, updated the resource catalog, facilitated the annual OJJDP training and technical assistance grantee and contractor meeting, developed a bimonthly newsletter (NTTAC News), continued to update the repository of training and technical assistance materials and the electronic database of training and technical assistance materials, and continued to respond to training and technical assistance requests from the field. In FY 1999, NTTAC was operated by the Juvenile Justice Clearinghouse, which provided clearinghouse services and maintained the 800 number. The fourth grantee-contractor meeting was conducted by OJJDP staff in Chicago, and the training and technical assistance protocols developed in 1998 were reviewed in preparation for final issuance. In FY 2000, a competitive 1-year contract was awarded to Caliber Associates to continue implementation of the Center. The Center has completed a number of tasks, including implementing the *OJJDP Training, Technical Assistance, and Evaluation Protocols,* developing three supplemental technical assistance packages on corrections, developing a protocol for ensuring cultural competency in the delivery of training and technical assistance, issuing the NTTAC newsletter, redesigning the NTTAC Web site, developing and pilot testing a training and technical assistance data collection instrument in support of the development of an Office of Justice Programs comprehensive training and technical assistance database, updating the resource catalog, and convening the 5th Annual OJJDP Training and TA Grantee and Contractor Meeting.

In FY 2001, the Center will continue developing marketing materials and managing the brokering of training and technical assistance requests received by the Center via the 800 number, e-mail, and the Web site. The contractor will also redesign and increase the capacity of the NTTAC Web site, increase the capacity of the Center resource repository, redesign the Center's database and resource catalog using the training and technical assistance data collection instrument developed and tested in FY 2000, provide train-the-trainers workshops for OJJDP grantee-contractors, provide technical support on curriculum development and specialized technical assistance protocols, and develop fact sheets, bulletins, and newsletters.

A new solicitation will be issued and a contract awarded through a competitive contract action in FY 2001.

OJJDP Management Evaluation Contract

This contract was competitively awarded in FY 1999 to Caliber Associates for a period of 4 years to provide OJJDP with an expert resource to perform independent program evaluations and assist in implementing evaluation activities. Caliber is currently conducting a national evaluation of Title V-Community Prevention Grants for Local Delinquency Prevention Programs. The evaluation is designed to examine the viability and effectiveness of the Title V delinquency prevention model. To address the research questions, the evaluation is examining the key stages of program implementation at the local level, which include community mobilization, assessment and planning, implementation, and institutionalization and monitoring.

Other evaluation activities include building local evaluation capacity by conducting ongoing evaluation technical assistance and training activities to meet the individual evaluation needs of Title V subgrantees and developing the annual Title V Report to Congress.

This contract will be implemented by the current contractor, Caliber Associates. No additional applications will be solicited in FY 2001.

OJJDP Technical Assistance Support Contract—Juvenile Justice Resource Center

This contract has been competitively awarded since the mid-1980's when OJJDP identified the need for technical assistance support in carrying out its mission. FY 2001 is the third year of a 4-year project period. The Juvenile Justice Resource Center (JJRC) provides technical assistance and support to OJJDP, its grantees, and the Coordinating Council on Juvenile Justice and Delinquency Prevention in the areas of program development, evaluation, training, and research. With assistance from expert consultants, JJRC coordinates the peer review process for OJJDP grant applications and grantee reports, conducts research and prepares reports on current juvenile justice issues, plans meetings and conferences, and provides administrative support to various Federal councils and boards.

This contract will be implemented by the current contractor, Aspen Systems Corporation. No additional applications will be solicited in FY 2001.

Program of Research on the Causes and Correlates of Delinquency

Since 1986, this longitudinal study has addressed a variety of issues related to juvenile violence and delinquency and has produced a massive amount of information on the causes and correlates of delinquent behavior. Three project sites participate: Institute of Behavioral Science, University of Colorado at Boulder; Western Psychiatric Institute and Clinic, University of Pittsburgh; and Hindelang Criminal Justice Research Center, University at Albany, State University of New York. These projects are designed to improve the understanding of serious delinquency, violence, and drug use by examining how youth develop within the context of family, school, peers, and community. The three sites engage in both collaborative and site-specific research. The three research teams worked together to ensure that certain core measures were identical across the sites. This strengthens the findings from these projects by allowing for replications of findings in individual sites and enabling cross-site analyses.

Results from the study have been used extensively in the field of juvenile justice and contributed significantly to the development of OJJDP's Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders and other program initiatives. Over the years, findings from the Causes and Correlates research have been presented in a number of OJJDP Bulletins and Fact Sheets. In an effort to make these important findings increasingly accessible to the public, a Causes and Correlates of Delinquency subpage has been incorporated into the OJJDP Web site. The subpage (www.ojjdp.ncjrs.org/ccd/index.html) includes descriptions of the individual projects and a bibliography of all the publications resulting from these projects.

In the upcoming year-the second year in a 3-year project period, the Causes and Correlates projects will continue collaborative and site-specific analyses of the data. Topics for upcoming reports will include defining characteristics and predictors of very young offending, consequences of delinquency, and long term effects of juvenile justice system

involvement. In addition, researchers at the three sites will continue efforts to provide researchers access to the Causes and Correlates data. Concerns about confidentiality prohibit the release of the data sets to the general public. However, OJJDP and the Causes and Correlates researchers have been exploring alternative methods of making the data more accessible to other researchers, the most promising being a remote access system. Plans for the upcoming year include developing and testing a remote access system at one of the sites.

This program will be implemented by the current grantees, the Regents of the University of Colorado, the University of Pittsburgh; and the Research Foundation of the State University of New York at Albany, SUNY. No additional applications will be solicited in FY 2001.

SafeFutures: Partnerships To Reduce Youth Violence and Delinquency

In FY 1995, OJJDP competitively selected six communities to implement the SafeFutures Program. SafeFutures seeks to prevent and control youth crime and victimization through the creation of a continuum of care in communities. This continuum enables communities to be responsive to the needs of youth at critical stages of their development by providing an appropriate range of prevention, intervention, treatment, and sanctions programs. The services provided through these programs include family strengthening; afterschool activities; mentoring; treatment alternatives for juvenile female offenders; mental health services; day treatment; graduated sanctions for serious, violent, and chronic juvenile offenders; and gang prevention, intervention, and suppression.

OJJDP will award fifth year funding to the Boston SafeFutures site in order to complete its 5-year project period, which began in FY 1995 through a competitive process. In FY 2001, Boston SafeFutures will continue to provide a set of services that builds on community strengths and existing services and fills in gaps within their existing continuum. Specific attention will also be given to improving the coordination and integration of services and program sustainability within Boston.

In addition, within the program developments and system changes that have occurred in the other five communities, there are promising activities, programs, and approaches that can serve as a model for other communities. In FY 2001, OJJDP will provide limited support through a competitive process among the SafeFutures grantees to assist the sites in sustaining these aspects of the programs. The Boston project will not be eligible for these funds because, unlike the other sites, it will not be finished with the fifth year of the project at that time.

A national evaluation is being conducted by the Urban Institute to determine the success of the initiative and track lessons learned at each of the six SafeFutures sites. OJJDP has also committed training and technical assistance resources to SafeFutures sites in FY 2001.

SafeFutures activities will be implemented by the current grantees. No additional applications will be solicited in FY 2001.

Technical Assistance for State Legislatures

Since FY 1995, OJJDP has awarded annual grants to the National Conference of State Legislatures (NCSL) to provide relevant, timely information on comprehensive approaches in juvenile justice to aid State legislators in improving State juvenile justice systems. Nearly every State has enacted, or is considering, statutory changes affecting the juvenile justice system. This project has helped policymakers understand the ramifications and nuances of juvenile justice reform.

The grant has improved capacity for the delivery of information services to State legislatures. The project also supports increased communication between State legislators and State and local leaders who influence decisionmaking regarding juvenile justice issues. In FY 2000, NCSL published and distributed the second edition of ''Comprehensive Justice: A Legislator's Guide.'' Designed as a folder containing a series of briefing papers, the guide focuses on systemic juvenile justice from a policy perspective and includes many examples of how State legislation has created or implemented components of comprehensive juvenile justice.

NCSL has also provided onsite technical assistance to many States developing or refining legislation. It has conducted annual invitational forums for select legislators involved in legislative activity that may warrant increased understanding on various juvenile justice issues. NCSL also maintains an informational clearinghouse on juvenile justice issues.

In FY 2001, NCSL will—

- Provide tailored, in-State assistance to four legislatures.
- Produce and distribute a 60-minute audiotape based on ''Comprehensive Justice: A Legislator's Guide.''
- Prepare and distribute to legislators and staff two LegisBriefs (fact sheets) on key juvenile justice topics.
- Plan and convene a concurrent session at the NCSL 2001 annual convention.
- Continue research, analysis, and reporting on State juvenile justice enactments.

The project will be implemented by the current grantee, the National Conference of State Legislatures. No additional applications will be solicited in FY 2001.

Telecommunications Assistance

OJJDP uses information technology and distance training to facilitate access to information and training for juvenile justice professionals. This cost-effective medium enhances OJJDP's ability to share with the field salient elements of the most effective or promising approaches to various juvenile justice issues. In FY 1995, OJJDP awarded a competitive grant to Eastern Kentucky University (EKU) to produce live satellite teleconferences. In FY 2000, OJJDP continued the cooperative agreement with EKU to provide program support and technical assistance for a variety of information technologies and to explore linkages with key constituent groups to advance mutual information goals and objectives. This medium allows practitioners, policymakers, and researchers from across the country to keep abreast of developments in the field without having to travel. A typical videoconference will reach some 500 sites and approximately 15,000 persons at downlink sites and through personal computers.

During FY 2000, EKU produced five ''live'' satellite videoconferences and experimented with cybercasting ''live'' satellite videoconferences on the Internet. OJJDP has employed the use of Internet Streaming to simultaneously allow persons to observe and hear satellite videoconferences from desktop personal computers.

Currently, project staff are studying the feasibility of taking past satellite videoconference materials, video, printed hardcopy materials, and interviews with panelists and developing a Web-based tool or CD–ROM of the information to be used as a training or educational tool. EKU will continue to provide technical assistance to other organizations planning to conduct satellite videoconferences.

This project will be implemented by the current grantee, Eastern Kentucky

University. No additional applications will be solicited in FY 2001.

Training and Technical Assistance Coordination for the SafeFutures Initiative

OJJDP will continue funding for limited training and technical assistance to the SafeFutures Initiative in FY 2001. This coordination effort enhances local capacity for implementing and sustaining effective continuum-of-care and systems change approaches in the six SafeFutures sites. Project activities include assessment, identification, and coordination of the implementation of training and technical assistance needs at each of the sites. In FY 2001, this training and technical assistance will focus on sustaining the successes that the sites achieved during the previous years of the program.

This program will be implemented by the current grantee, Patricia Donahue. No additional applications will be solicited in FY 2001.

Public Safety and Law Enforcement

Evaluation of the Comprehensive Community-Wide Approach to Gang Prevention, Intervention, and Suppression Program

OJJDP will continue funding this evaluation in FY 2001. Under a competitive cooperative agreement awarded in FY 1995, the evaluation grantee assisted the five program sites (Bloomington, IL; Mesa, AZ; Riverside, CA; San Antonio, TX; and Tucson, AZ) in establishing realistic and measurable objectives, documenting program implementation, and measuring the impact of this comprehensive approach. It has also provided interim feedback to the program implementors and trained the local site interviewers. The grantee will continue to gather and analyze data required to evaluate the program, monitor and oversee the quality control of data, provide assistance for completion of interviews, and provide ongoing feedback to project sites. This project began in 1995 and will end in 2002.

This project will be implemented by the current grantee, the University of Chicago, School of Social Service Administration. No additional applications will be solicited in FY 2001.

Evaluation of the Partnerships To Reduce Juvenile Gun Violence Program

This project began with a competitive award in FY 1997 to document and evaluate the process of community mobilization, planning, and collaboration needed to develop a comprehensive, collaborative approach to reducing gun violence involving juveniles. The Partnerships To Reduce Juvenile Gun Violence Program is being implemented in three sites: Baton Rouge, LA; Oakland, CA; and Syracuse, NY. The grantee, COSMOS Corporation, will continue data collection and submit a interim report on the impact evaluation in the next year. In addition to working with the three Partnership sites, COSMOS Corporation completed work in FY 2000 on the OJJDP Bulletin *Fighting Juvenile Gun Violence* and has developed a training and technical assistance protocol based on its experience with the Partnership sites and the gun violence report. This training and technical assistance package will be offered to a limited number of communities that are focused on reducing gun violence through a collaborative planning process.

This project will be implemented by the current grantee, COSMOS Corporation. No additional applications will be solicited in FY 2001.

Evaluation of the Rural Gang Initiative

This initiative is a continuation of ongoing efforts to test OJJDP's Comprehensive Gang Model. In FY 1999, four competitively selected rural sites conducted comprehensive assessments of their local gang problem and developed program designs to implement the Comprehensive Gang Model. These sites were Elk City, OK; Glenn County, CA; Mt. Vernon, IL; and Longview, WA. The evaluation grantee, the National Council on Crime and Delinquency (NCCD), has conducted case studies to document and analyze the 1-year community assessment and program planning efforts in the four sites. These case studies will contribute to the development of a model approach to assessment of community gang problems in rural areas. NCCD has also developed an outcome evaluation design for sites that are being funded to implement the model in subsequent years. FY 2000 was the first year of funding for the outcome evaluation, and FY 2001 funding will continue to support data collection for this evaluation.

This program will be implemented by the current grantee, the National Council on Crime and Delinquency. No additional applications will be solicited in FY 2001.

Evaluation of the Transfer of Responsibility for Child Protective Investigations to Law Enforcement Agencies

In response to concerns about the increasing demands on public child welfare agencies, the safety of children, and the effectiveness of law enforcement and social service agencies to deliver critical services, the State of Florida passed legislation in 1998 that allows for the transfer of the entire responsibility for child protective investigations to a law enforcement agency. Currently, three counties in Florida are in various stages of implementing this transfer of responsibility. This project is comparing the outcomes in the three counties where responsibility is being transferred to the sheriff's office with three comparison counties in the State of Florida. The project is concerned primarily with whether children are safer, whether perpetrators of severe child abuse are more likely to face criminal sanctions, and whether there are impacts on other parts of the child welfare system. Also, a thorough process evaluation will be conducted to describe and compare the implementation process across the three counties. This project is in the final year of a 3-year period.

This evaluation is being funded under an interagency agreement with the National Institute of Justice. The grantee is the School of Social Work, University of Pennsylvania. No additional applications will be solicited in FY 2001.

Gang Prevention Through Targeted Outreach (Boys & Girls Clubs)

The purpose of this program is to enable local Boys & Girls Clubs to prevent youth from entering gangs, intervene with gang members in the early stages of gang involvement, and divert youth from gang activities into more constructive programs. This program reflects the ongoing collaboration between OJJDP and the Boys & Girls Clubs to reduce problems of juvenile delinquency and violence. The Boys & Girls Clubs of America provides training and technical assistance to local gang prevention and intervention sites, including some at OJJDP Comprehensive Gang sites, and to other clubs and organizations through regional trainings and national conferences. In FY 2000, the Boys & Girls Clubs added new gang prevention sites, gang intervention sites, and ''Targeted Reintegration'' sites where clubs work to provide services to youth returning to the community from juvenile correctional facilities to prevent them from returning to gangs and violence. In FY 2001, the Boys & Girls Clubs of America will identify and support up to 30 new gang prevention sites through targeted outreach and will also hold a Delinquency and Gang

Prevention Symposium in the spring. A national evaluation of this program is being implemented by Public/Private Ventures.

This program will be implemented by the current grantee, the Boys & Girls Clubs of America. No additional applications will be solicited in FY 2001.

Juvenile Justice Law Enforcement Training and Technical Assistance Program

The Juvenile Justice Law Enforcement Training and Technical Assistance Program explores adolescent violence in the United States as a social phenomenon and a policy issue. The program covers a range of youth violence issues including the examination of crime statistics and emerging legislation. The program also conducts analysis of key areas of youth violence policy and practice: youth firearm possession and use; school violence and safety; youth-oriented community policing; gang and drug involvement; serious, violent, and habitual juvenile offenders; multidisciplinary youth violence strategies; police management of youth programs; tribal juvenile crime; and Chief Executive Officer responses to delinquency and violence.

The program examines the core issues of youth violence using methods that are consistent with effective police practices and that promote a more positive future for America's youth. Similarly, leaders in the areas of law enforcement, prosecution, the courts, corrections, probation, and other juvenile justice agencies receive information, materials training and technical assistance designed to solve managerial issues that hinder the implementation of effective youth crime prevention strategies.

Since FY 1999, Federal funds have supported the provision of training sessions and technical assistance to State and local law enforcement jurisdictions. In FY 2000, the following workshops were conducted: (1) School Administrators For Effective Police Operations Leading to Improved Children and Youth Services and (2) Serious Habitual Offender Comprehensive Action Program (SHOCAP). Based on practitioner feedback and needs assessment data, the grantee completed revisions to the Chief Executive Officer Youth Violence Forum. Additionally, an instructional design committee has been formed to revise and update the following: Youth, Gang, Gun and Drug Policy; Youth Oriented Community Policing, and the Youth Violence Reduction Comprehensive Action Program. A new workshop, Tribal Law Enforcement Training and Technical Assistance, is also under development. The grantee will continue to provide training and technical assistance through the workshops series described above.

This program will be implemented by the current grantee, the International Association of Chiefs of Police. No additional applications will be solicited in FY 2001.

Mesa Gang Intervention Project (MGIP)

In FY 1995, OJJDP competitively selected the City of Mesa to be one of five communities to implement and test the OJJDP Comprehensive Gang Model. Since that time, the Mesa Gang Intervention Project (MGIP) has become an exciting and promising gang intervention program. The program targets youth in Mesa who are gang involved and youth who are at high-risk for gang involvement. The program provides a cadre of services including job skill development, counseling, drug and alcohol treatment and prevention, tattoo removal services, and outreach. The program monitors gang-involved youth, holding them accountable for negative behaviors. The program has developed into a partnership with many agencies in Mesa, including police, adult and juvenile probation, United Way, local Boys & Girls Clubs, other youth-serving agencies, private businesses/corporations, and others. Preliminary evaluation information from MGIP looks very promising in reducing youth gang crime among targeted youth. Additionally, the program has been well received locally and most program components and staff have been sustained with local funds.

In FY 2001, OJJDP will provide limited additional support to MGIP to continue the local evaluation and assessment activities and allow MGIP to function as a ''host'' site for future OJJDP training on the Comprehensive Gang Model.

This project will be implemented by the current grantee, the City of Mesa, AZ. No additional applications will be solicited in FY 2001.

National Youth Gang Center

The proliferation of gang problems over the past two decades led OJJDP to develop a comprehensive, coordinated response to America's gang problem. This response involved five program components, one of which was implementation and operation of the National Youth Gang Center (NYGC). Competitively funded in 1994 to expand and maintain the body of critical knowledge about youth gangs and effective responses to them, NYGC provides support services to the National Youth Gang Consortium, composed of Federal agencies with responsibilities in this area. NYGC is also providing technical assistance for OJJDP's Rural Gang Initiative. In FY 2000, NYGC (1) conducted indepth analyses of the National Youth Gang Survey results that track changes in gang membership and activity, (2) produced timely information on the nature and scope of the youth gang problem, (3) continued tracking gang-related legislation at both the State and Federal level, and (4) continued providing training and technical assistance to the Rural Gang Initiative program sites.

With FY 2001 funds, the Center will continue to collect, analyze, and disseminate current, comprehensive, and accurate national-level gang-related information. It will continue to assist State and local jurisdictions in the collection, analysis, and exchange of information on gang-related demographics, legislation, literature, research, and promising program strategies. The Center will also continue to provide indepth technical assistance to Rural Gang Initiative grantees and to grantees of other OJJDP gang programs.

This program will be implemented by the current grantee, the Institute for Intergovernmental Research. No additional applications will be solicited in FY 2001.

Rural Gang Initiative Demonstration Sites

During FY 2000, OJJDP competitively funded four rural communities (Elk City, OK; Glenn County, CA; Longview, WA; and Mount Vernon, IL) to conduct a comprehensive assessment of the local youth gang problem. Each site has collected relevant data from multiple sources, including police, schools, courts, and community residents. They have gathered various types of data, including data on gang crime, the presence of risk factors for gang membership, and community demographics, and data from community surveys and focus groups. This information was used in each site to determine the nature and scope of the existing youth gang problems. A steering committee made up of community representatives in each site used the final assessment findings to develop a response to the problems identified. In two of the four sites, it was determined and agreed locally that an intensive gang intervention effort was not necessary. Instead, these two communities will use the data to develop gang prevention services and

intervene with delinquent and gang-involved youth through a less intensive effort. The remaining two sites have determined that a more intensive gang intervention effort is required and will implement the OJJDP Comprehensive Gang Model in FY 2001.

In FY 2001, OJJDP will support the two communities implementing the OJJDP Comprehensive Gang Model. An independent evaluation of these two sites will also be conducted and technical assistance will be provided through the National Youth Gang Center.

This initiative will be implemented by two of the four current grantees, Glenn County, CA, and Mount Vernon, IL. No additional applications will be solicited for this initiative in FY 2001.

Technical Assistance to the Gang-Free Schools and Communities Initiatives

In FY 2000, OJJDP launched a multisite replication of the OJJDP Comprehensive Gang Model and a four-site demonstration program to implement the Model and further enhance the Model's school component. In FY 2001, OJJDP will fund the National Youth Gang Center to provide training and technical assistance during the implementation stages of this initiative in selected communities across the country. The National Youth Gang Center is currently providing technical assistance on OJJDP's Model to communities involved in OJJDP's Rural Gang Initiative and to other OJJDP grantees.

OJJDP will provide a supplemental award to the National Youth Gang Center to provide the technical assistance. No additional applications will be solicited in FY 2001.

Delinquency Prevention and Intervention

Assessing Alcohol, Drug, and Mental (ADM) Disorders Among Juvenile Detainees

This project is a major longitudinal study assessing alcohol, drug, and mental disorders among juveniles in the Cook County Detention Center in Chicago, IL. The project has three primary goals: (1) To determine how alcohol, drug, and mental disorders develop over time among juvenile detainees, (2) to investigate whether juvenile detainees receive needed psychiatric services after their cases reach disposition (whether they return to the community or are incarcerated), and (3) to study the development and interrelationship of dangerous and risky behaviors related to violence, substance use, and HIV/AIDS. This project is unique because the sample is so large: it includes 1,833 youth from Chicago who were arrested and interviewed between 1995 and 1998. The sample is stratified by gender, race (African American, Hispanic, non-Hispanic white), and age. Initial interviews have been completed, and extensive archival data (arrest and incarceration history, health and mental health treatment, etc.) collected on each subject. The investigators have been tracking the subjects and are now conducting the first set of followup interviews. A significant number of deaths, virtually all of them linked to violence (*e.g.* gunshot wounds), have already occurred. Because of their extensive and thorough tracking procedures, the investigators will be able to reinterview subjects regardless of whether they are back in the community, incarcerated, or have left the immediate area. The large sample size will provide sufficient statistical power to study rarer disorders (including co-occurring disorders), patterns of drug use, and risky, life-threatening behaviors.

This project will be implemented by the current grantee, Northwestern University. No additional applications will be solicited in FY 2001.

The Chicago Project for Violence Prevention

The Chicago Project for Violence Prevention is a citywide, long-term effort to reduce violence. Objectives include reductions in homicide, physical injury, disability and emotional harm from assault, domestic abuse, sexual abuse and rape, and child abuse and neglect. A partnership among the Chicago Department of Public Health, the Illinois Council for the Prevention of Violence, the University of Illinois, and Chicago communities, the project began in 1995 with joint funding from OJJDP and the Centers for Disease Control and Prevention, the National Center for Injury Prevention and Control, the Bureau of Justice Assistance, and the U.S. Department of Housing and Urban Development. The Project now provides technical assistance to seven Chicago communities and citywide organizations involved in violence prevention planning. In FY 2001, the Chicago Project will complete evaluation reports on the first three communities involved in the project.

This project will be implemented by the current grantee, the University of Illinois, School of Public Health. No additional applications will be solicited in FY 2001.

Communities In Schools, Inc.

The purpose of Communities In Schools (CIS) is to provide training and technical assistance to the CIS Network that will result in increased ability to build economic opportunity for CIS students and families, to build healthy families and communities, and to build healthy public-private partnerships throughout the CIS Network. A special focus is placed on strengthening the families of CIS youth. In FY 2000, CIS has exceeded anticipated outcomes and demonstrated that grant resources have leveraged additional activity for family strengthening activities in the CIS Network. Working with the Families and Schools Together (FAST) National Training and Evaluation Center, CIS is creating a network of expert trainers to disseminate proven family strengthening initiatives. To that end, the focus has been on ''seeding'' the CIS Network with the Families and Schools Together (FAST) research-based approach to family strengthening. The implementation of the FAST program is taking place through statewide initiatives in Missouri, North Carolina, and South Carolina, and interest in statewide replication has been identified in Georgia, Kentucky, and Texas. In FY 2001, Communities In Schools will expand the number of sites in the CIS Network implementing the FAST program.

The program will be implemented by the current grantee, Communities In Schools, Inc. No additional applications will be solicited in FY 2001.

Diffusion of State Risk-and Protective-Factor-Focused Prevention

Since FY 1997, OJJDP has provided funds to the National Institute on Drug Abuse, through an interagency agreement, to support this 5-year study of the public health approach to prevention, focusing on risk and protective factors for substance abuse at the State and community levels. The study is identifying factors that influence the adoption of the public health approach and assessing the association between this approach and the levels of risk and protective factors and substance abuse among adolescents. The study will also examine State substance abuse data gathered from 1988 through 2001 and use interviews to describe the process of implementing the epidemiological risk- and protective-factor approach in Colorado, Illinois, Kansas, Maine, Oregon, Utah, and Washington.

This project will be implemented under an interagency agreement with the National Institute on Drug Abuse by

the current grantee, the Social Development Research Group at the University of Washington School of Social Work. No additional applications will be solicited in FY 2001.

Do the Write Thing Challenge Program

This program provides youth at risk of delinquency, crime, and victimization with an opportunity to use the written word to express their ideas on how best to address these problems in their communities. The program uses teachers and volunteers from law enforcement, the juvenile justice system, the medical community, and youth-serving organizations to work with the youth to develop their ideas and put them on paper in narrative or poetic form. Program participants learn to respect others' ideas and to understand the value and power of words. Students are asked to accept the challenge and pledge to avoid violence in their own lives and help prevent and reduce it in the lives of others.

With OJJDP funding, which began in FY 1997, the program has expanded to 18 cities with more than 450 schools and youth-serving organizations participating. This past school year, more than 50,000 students participated in the program's classroom discussions about youth violence and possible solutions. In FY 2001, the program will prepare a comprehensive analysis of at least 5,000 student submissions, publish a summary and develop a computer presentation of that analysis, and provide training and technical assistance to help the local Do the Write Thing committees establish a new initiative, Community Peace Partnerships, to unite local groups working to prevent and reduce youth violence and victimization.

This program will be implemented by the current grantee, the National Campaign to Stop Violence. No additional applications will be solicited in FY 2001.

Evaluation of the Truancy Reduction Demonstration Program

In FY 1999, OJJDP began funding seven sites around the country to implement truancy reduction programs. Grantees, representing a diversity of models and geographic locations, include Contra Costa, CA; Honolulu, HI; Houston, TX; Jacksonville, FL; King County, WA; Suffolk County, NY; and Tacoma, WA. Also in 1998, OJJDP funded the Colorado Foundation for Families and Children (CFFC) to conduct a national evaluation of the Truancy Reduction Demonstration Program. As part of the evaluation, CFFC is working with the sites to (1) determine how community collaboration can impact truancy reduction and lead to systemic reform; and (2) assist OJJDP in the development of a community collaborative truancy reduction program model and identify the essential elements of that model. To that end, CFFC will continue to assist project sites during this second year to identify and document the nature of the truancy problem in their communities, enhance the process of effective truancy reduction planning and collaboration, and incorporate that process into the implementation of the Truancy Reduction Demonstration Program at each site. In addition, CFFC is assisting sites in collecting information on truant youth and documenting services. The project is scheduled to last 3½ years.

This project will be implemented by the current grantee, the Colorado Foundation for Families and Children. No additional applications will be solicited in FY 2001.

Intergenerational Transmission of Antisocial Behavior

The purpose of this study, started in FY 1998, is to examine the development of childhood antisocial behavior in a three-generation prospective panel study, by making the children of the current participants in the OJJDP-sponsored Rochester Youth Development Study the focal subjects of a new long-term study. By the age of 21, 40 percent of the original Rochester participants were parents. The study will combine data obtained from the original study on the participants and their parents, with data from this new project collected on the children of the original participants. This provides the unique opportunity to examine and track the development of delinquent behavior across three generations in a particularly high-risk sample. Such a cohort is rare in social science research. The results of the study should provide very useful findings that should have policy implications for prevention programs. In the second year of this 5-year commitment, the program will continue data collection.

The project will be implemented under an interagency agreement with the National Institute of Mental Health by the current grantee, the University at Albany, State University of New York. No additional applications will be solicited in FY 2001.

Investing in Youth for a Safer Future—A Public Education Campaign

OJJDP will continue its support of the National Crime Prevention Council's (NCPC's) ''Invest in Youth for a Safer Future'' advertising campaign through the transfer of funds to the Bureau of Justice Assistance (BJA). OJJDP and BJA are working with NCPC to produce, disseminate, and support effective public service advertising and related media to inform the public of effective solutions to juvenile crime and to motivate young people and adults to get involved and support these solutions. The featured solutions include effective prevention programs and intervention strategies.

The program will be implemented under an interagency agreement with the Bureau of Justice Assistance by the current grantee, the National Crime Prevention Council. No additional applications will be solicited in FY 2001.

Multisite, Multimodal Treatment Study of Children With Attention Deficit/Hyperactivity Disorder

OJJDP will transfer funds under a 5-year interagency agreement with the National Institute of Mental Health (NIMH) to support this research, funded principally by NIMH. In 1992, NIMH began a study of the long-term efficacy of stimulant medication and intensive behavioral and educational treatment for children with attention deficit/hyperactivity disorder (ADHD). Although ADHD is classified as a childhood disorder, up to 70 percent of afflicted children continue to experience symptoms in adolescence and adulthood. The study will continue through 2001 and will follow the original families and a comparison group. OJJDP's participation, which began in FY 1998, supports continued investigations into the subjects' delinquent behavior and contact with the legal system, including arrests and court referrals.

This program will be implemented through an interagency agreement with the National Institute of Mental Health. No additional applications will be solicited in FY 2001.

Risk Reduction Via Promotion of Youth Development

Also known as Early Alliance, this program, begun in FY 1997, is a large-scale prevention study involving hundreds of children in several elementary schools in lower socioeconomic neighborhoods of Columbia, SC. This project is designed to promote coping competence and reduce risk for conduct problems, aggression, substance use, delinquency and violence, and school failure beginning in early elementary school. The interventions begin in the first grade, and children are followed longitudinally throughout the 5 years of

the project. A major goal of the project is to reduce the development of conduct problems, aggression, and subsequent delinquency and violence. The project also seeks to alter home and school climates in order to reduce risk for adverse outcomes and to promote positive youth development. This project is in the final year of a 5-year project period.

This project will be implemented under an interagency agreement with the National Institute of Mental Health by the current grantee, the University of South Carolina. No additional applications will be solicited in FY 2001.

Strengthening Services for Chemically Involved Children, Youth, and Families

The U.S. Departments of Justice and Health and Human Services (HHS) provide services to children affected by parental substance use or abuse. OJJDP administers this training and technical assistance program, which began in FY 1998. HHS's Substance Abuse and Mental Health Services Administration has partnered with OJJDP to fund a cooperative agreement with the Child Welfare League of America (CWLA), a nonprofit organization. CWLA is assisting child welfare personnel to provide appropriate intervention services for children impacted by the abuse of alcohol and other drugs (AOD) and for their caregivers. CWLA is producing a comprehensive assessment tool and decisionmaking guidelines for child welfare workers and supervisors. CWLA training and technical assistance will help to develop innovative and effective approaches to meeting the needs of children in the child welfare system whose parents are AOD abusers.

Previously, the grantee developed a curriculum based on the Substance Affected Families Environmental and Strengths Assessment, drafted a training outline, edited design materials, and provided ongoing support to CWLA national training staff. In FY 2001, CWLA will continue the development and online dissemination of resource materials, training, and technical assistance to improve the ability of child welfare and juvenile justice direct service professionals to prepare youth in out-of-home care for adulthood, promote their positive development, and support them in avoiding high-risk behaviors.

This project will be implemented by the current grantee, the Child Welfare League of America. No additional applications will be solicited in FY 2001.

Study of the Marketing of Age-Restricted Violent Entertainment to Children

This study, published on September 11, 2000, was conducted by the Federal Trade Commission (FTC), with financial support from OJJDP. The study reported on the extent to which movies, video and computer games, and music recordings that are age-restricted because of their violent content are marketed or are available to children. The FTC completed four major tasks under this program: developed basic background information on the three industries and developed the study plan and procedures, surveyed industries to determine age groups being targeted in industry promotions, surveyed juveniles and parents to determine attitudes toward ratings, and conducted a survey to determine the degree of compliance with existing industry ratings. OJJDP is working with the FTC to develop materials to help parents better control their children's access to media products inappropriate for their age. The materials will explain the various rating systems; explain how materials are marketed to children, especially in locations not monitored by parents; and suggest actions parents may take to reassert their control over the types of media products to which their children are exposed.

This project will be implemented by the Federal Trade Commission under an extension to an interagency fund transfer agreement. No additional applications will be solicited in FY 2001.

Technical Assistance for Community Prevention Programs—Title V

The purpose of this contract is to provide OJJDP with the capacity to provide communities with training and technical assistance support for implementation of the Title V—Community Prevention Grants program. The contractor will continue to provide nationwide training and technical assistance for State and local jurisdictions on developing and implementing comprehensive communitywide, data-based delinquency prevention strategies. Through training and technical assistance, community representatives develop the knowledge and skills necessary to assess risk and protective factors for delinquency prevention. Community leaders will be trained to identify and direct community resources to address identified risk factors.

This project will be implemented by the current contractor, Development Services Group. No additional applications will be solicited in FY 2001.

Truancy Reduction Demonstration Program

In FY 1998, OJJDP, the Office of Justice Programs' Executive Office of Weed and Seed, and the U.S. Department of Education jointly engaged in a grant program to address truancy. This program specifically outlines four major comprehensive components: (1) System reform and accountability, (2) a service continuum to address the needs of children and adolescents who are truant, (3) data collection and evaluation, and (4) a community education and awareness program from kindergarten through grade 12 that addresses the need to prevent truancy and to intervene with youth who are truant. The goals of this program are to develop and implement or expand and strengthen comprehensive truancy programs that pool education, justice system, law enforcement, social services, and community resources to (1) identify truant youth; (2) cooperatively design and implement comprehensive, systemwide programs to meet the needs of truants; and (3) design and maintain systems for tracking truant youth. OJJDP has awarded funds for this program to seven sites: three non-Weed-and-Seed sites (Honolulu, HI; Jacksonville, FL; and King County, WA) and four Weed and Seed sites (Houston, TX; Martinez, CA; Tacoma, WA; and Yaphank, NY). All sites are currently involved in program development and implementation of plans that link youth and adolescents who are truant with community-based services and programs. They are also involved in full implementation of the community's comprehensive systemwide plan to prevent and intervene with the problem of truancy. This program is currently being evaluated by the Colorado Foundation for Families and Children (CFFC), which is conducting a process evaluation that will help to identify key elements of an effective truancy program.

This program will be implemented by the current grantees, Honolulu, HI; Houston, TX; Jacksonville, FL; King County, WA; Martinez, CA; Tacoma, WA; and Yaphank, NY. No additional applications will be solicited in FY 2001.

Strengthening the Juvenile Justice System

Balanced and Restorative Justice (BARJ) Training Project

The goal of the BARJ project is to help control juvenile delinquency through increased use of restitution, community service, and other innovative programs as part of a jurisdictionwide juvenile justice change from traditional retributive or rehabilitative system models to balanced and restorative justice orientation and procedures. The specific steps for achieving this goal involve preparing materials, training personnel interested in BARJ, and providing onsite technical assistance to selected State and local jurisdictions committed to implementing BARJ. Materials to be developed in FY 2001, the third year of a 3-year project period, will include documents on restorative justice programs, practices, and policy directions. The materials will be useful for training juvenile justice system practitioners and managers on the BARJ model and for providing onsite technical assistance. The training and technical assistance will be delivered at regional and national roundtables, juvenile justice conferences, and specialized workshops. ''Training of trainers'' programs will also be offered. There will be some concentration of BARJ technical assistance at the State level and on advancing judges' and prosecutors' leadership in the area of restorative justice. Further, there will be an effort to involve corporations and foundations in BARJ implementation and initial exploration of introducing BARJ in higher education.

Over recent years, the BARJ Project has reached justice system managers and practitioners in every State, and there is now some restorative justice activity going on in every State. The project has developed both basic and advanced BARJ training curriculums (in cooperation with the National Institute of Corrections); BARJ resource documents, such as an implementation guide, and a soon-to-be-published restorative justice inventory. In addition, numerous articles in professional periodicals have been published by project staff and consultants.

During the past 12 months, BARJ staff and consultants presented more than 25 key training and technical assistance events. Notable among these were a number of roundtables for judges, Native American juvenile justice administrators, and (regionally) representatives of States interested in implementing BARJ. The roundtables typically draw from 30 to 40 local juvenile justice leaders. BARJ staff also held Forums on Changing Roles for Juvenile Probation, Prosecutor Involvement in Restorative Justice, and Strength-Based Rehabilitation and Competency Development. Further, intensive training and onsite technical assistance were provided to nine ''special emphasis States.'' In addition, BARJ staff and consultants delivered two ''train the trainer'' courses and a Basic BARJ Principles course (in cooperation with the Juvenile Accountability Incentive Block Grants program and with the National Institute of Corrections). Since 1998, the project has organized or made presentations at more than 100 events. Over 10,000 juvenile justice and related practitioners have participated in these events. Seven BARJ publications are currently in various stages of production.

This project will be implemented by the current grantee, Florida Atlantic University. No additional applications will be solicited in FY 2001.

Blueprints for Violence Prevention: Training and Technical Assistance

In FY 1998, OJJDP funded a cooperative agreement with the Center for the Study and Prevention of Violence (CSPV) at the University of Colorado. Under this agreement, CSPV provides intensive training and technical assistance to community organizations and units of local government to replicate 10 ''Blueprint'' model programs. These are programs that CSPV identified as meeting a rigorous scientific standard of proven program effectiveness and replicability for reducing adolescent violence, crime, and substance abuse. CSPV will help communities determine the feasibility of program development and also monitor and assist in the replication of these Blueprint programs for a period of 2 years.

The model programs being replicated under this award include Multisystemic Therapy (MST), Promoting Alternative Thinking Strategies (PATHS), Nurse Home Visitation, Multidimensional Treatment Foster Care (MTFC), Quantum Opportunities Program, Bullying Prevention Program, Functional Family Therapy (FFT), and the Big Brothers/Big Sisters (BBBS) Mentoring Program.

To date, 40 sites are participating in the program. Overall, 594 individuals have been trained, for a total of 158 days of training.

CSPV has completed process evaluation visits with all 40 sites. A total of 3,078 individuals have been served through the Blueprints initiative. MST and BBBS clients have completed their fist year of implementation. Total clients served to date include the following: Bullying Prevention (2,303), PATHS (581), FFT (30), MTFC (7), MST (119); and BBBS (38). In FY 2001, the final year of a 2-year project period, the grantee will continue to provide overall guidance to the program and monitor the integrity of each implementation. CSPV will also conduct process evaluation site visits, provide phone consultation, and provide training and technical assistance.

This project will be implemented by the current grantee, the Regents of the University of Colorado. No additional applications will be solicited in FY 2001.

Building Blocks for Youth

The goals of this initiative are to protect minority youth in the justice system and promote rational and effective juvenile justice policies. These goals are accomplished by the following components: (1) conducting research on issues such as the impact on minority youth of new State laws and the implications of privatization of juvenile facilities by profit-making corporations; (2) undertaking an analysis of decisionmaking in the justice system and development of model decisionmaking criteria that reduce or eliminate disproportionate impact of the system on minority youth; (3) building a constituency for change at the national, State, and local levels; and (4) developing communication strategies for dissemination of information. A fifth component, direct advocacy for minority youth, is funded by sources other than OJJDP. Funding by OJJDP began in FY 1998.

The grantee, Youth Law Center (YLC), has undertaken a number of tasks to move this initiative forward. The grantee recently published a comprehensive report on the disparate impact on minority youth by the justice system at critical decision points. YLC is also supporting a wide range of national and local advocacy organizations to work for needed juvenile justice reforms. The grantee continues to build a constituency for change at the national, State, and local levels with this effort being informed by development of communications strategies based upon the results of a series of national focus groups that survey public opinion and perceptions of juvenile crime. YLC has released two publications, *The Color of Justice* and *And Justice for Some,* each of which drew attention and raised the interest levels of various public officials and interest groups. Several new

publications will be proposed for development in FY 2001.

This project will be implemented by the current grantee, Youth Law Center. No additional applications will be solicited in FY 2001.

Census of Juveniles in Residential Placement

The Census of Juveniles in Residential Placement (CJRP) collects individual-level data on all juveniles in residential placement on a specific reference day (the fourth Wednesday in October). The data elements collected include age, sex, race, placing agency, legal status, and most serious offense. Because this project is a census, it allows for State-level reporting of juveniles in residential placement or custody. The census is mailed to all facilities that can and do hold juvenile offenders. Facility personnel report on all offenders under 21 residing in their facilities on the specific reference day. The facilities also provide some basic information on any other persons who do not fit these criteria. The CJRP was first conducted in October 1997 and then again in October 1999. Data from the 1997 CJRP are available on the Internet in tabular form at OJJDP's Web site (www.ojjdp.ncjrs.org). Data from the 1999 CJRP will be available for public use by January 2001. The CJRP will be conducted a third time in October 2001, with data available by December 2002.

This program will be continued through the extension of an interagency agreement with the Bureau of the Census. No additional applications will be solicited in FY 2001.

Center for Students With Disabilities in the Juvenile Justice System

During FY 1999, OJJDP undertook a joint initiative with the Office of Special Education and Rehabilitative Services, U.S. Department of Education, to establish a Center for Students with Disabilities in the Juvenile Justice System. It is expected that this project will have a significant impact on the improvement of juvenile justice system services for students with disabilities. Improvements in the areas of prevention, educational services, and reintegration based on a combination of research, training, and technical assistance will lead to improved results for children and youth with disabilities. The Center for Students with Disabilities in the Juvenile Justice System will provide guidance and assistance to States, schools, justice programs, families, and communities to design, implement, and evaluate comprehensive educational programs, based on research-validated practices, for students with disabilities in the juvenile justice system.

This program will be implemented under an existing 5-year interagency agreement with the U.S. Department of Education by the current grantee, the University of Maryland. No additional applications will be solicited in FY 2001.

Comprehensive Children and Families Mental Health Training and Technical Assistance

OJJDP, under a 3-year interagency agreement, transferred funds to the Center for Mental Health Services (CMHS) in FY 1999 and FY 2000 to supplement a contract for training and technical assistance to the CMHS-funded Comprehensive Mental Health sites. The grantee has established the training and technical assistance center in Washington, DC, and has hired staff with juvenile justice and mental health experience to coordinate training and technical assistance to the 42 funded sites. This training and technical assistance is designed to enhance the involvement of the juvenile justice system in the systems of care being developed in each of the CMHS-funded sites. The juvenile justice coordinator has been working with program sites requesting assistance in engaging their juvenile justice systems through onsite and telephone technical assistance. The coordinator has also established linkages with key juvenile justice associations, such as the National Council of Juvenile and Family Court Judges, to foster their involvement. Additionally, the coordinator is developing a resource guide for the sites. Funds will be transferred to CMHS in FY 2001 for the final year of the 3-year interagency agreement.

This initiative will be implemented through an interagency agreement with the Center for Mental Health Services. No additional applications will be solicited in FY 2001.

Connecticut/Cook County (IL) Girls Collaborative

A national collaboration between the State of Connecticut and Cook County, IL, has been forged around the needs of court-involved girls. The primary goal of this collaboration is the creation of a replicable model of systems change for court-involved girls, including girls who are pregnant and/or young mothers. Since this project began in FY 1997, the sites have shared lessons learned and have taken action to improve services to court-involved girls. Specific accomplishments include conducting comprehensive studies of the Connecticut female juvenile offender population, convening a statewide ''Gender Responsiveness'' conference, providing training to juvenile justice staff on gender responsiveness, and developing a case management system for girls and a risk and needs assessment instrument. The project has begun to implement a pilot program and test gender-specific services.

OJJDP will support this national collaboration in FY 2001 in order to continue to develop innovative responses to the female offender population and girls at-risk of entering the juvenile justice system.

The program will be implemented by the current grantees, Cook County Board of Commissioners and Connecticut Judicial Branch. No additional applications will be solicited in FY 2001.

Development of the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders

This continuation grant will enable OJJDP to provide communities with training and technical assistance support for development of strategic plans and implementation of those plans that are based on the research foundation of the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders. The grantees will continue to provide training and technical assistance for State and local jurisdictions on developing and implementing comprehensive strategic plans that are designed to reduce juvenile delinquency. Through training and technical assistance, communities will develop the knowledge and skills necessary to assess risk and protective factors, develop and implement research-based programs and prevention and graduated sanctions services, and more effectively address juvenile crime in their communities.

This project will be implemented by the current grantees, Developmental Research and Programs, Inc. and the National Council on Crime and Delinquency. No additional applications will be solicited in FY 2001.

Evaluation of the Department of Labor's Education and Training for Youthful Offenders Initiative

This evaluation, initially funded in FY 1999, has documented the activities undertaken by two States awarded grants under the U.S. Department of Labor's (DOL's) Education and Training for Youthful Offenders Initiative. Each DOL grantee will provide comprehensive school-to-work education and training within a juvenile correctional facility and followup and

job placement services as youth return to the community. It is intended that the comprehensive services developed under these grants will serve as models for other juvenile correctional facilities across the country.

The OJJDP-sponsored evaluation of these projects is being conducted in two phases. During Phase I, a process evaluation is under way at each site to document the extent to which educational, job training, and aftercare services were enhanced with DOL funding. Also, the feasibility of conducting an impact evaluation at each site is being determined during Phase I. Phase II will entail conducting an impact evaluation at one or both sites. For those sites where a rigorous impact evaluation can be conducted, the effects of the program on job-related skills, employment, earnings, academic performance, and recidivism will be measured. The FY 2001 funds will be used to support the impact evaluation, if a feasible research design is accepted by OJJDP and the DOL.

This project will be implemented by the current grantee, the National Council on Crime and Delinquency. No additional applications will be solicited in FY 2001.

Evaluation of the Performance-Based Standards Project

To enhance the usefulness of the Performance-Based Standards (PbS) project, OJJDP entered into an interagency agreement with the U.S. Department of Commerce, under its Performance Consortium Program, to support a formative evaluation of the project. This evaluation is being conducted by the National Academy of Public Administration (NAPA), which founded the Center for Improving Government Performance, through which it administers the Performance Consortium. NAPA's national evaluation provides an independent assessment of the PbS project's design, field support, and program implementation. Currently, the PbS project has 58 participating juvenile facilities, including active participation by 11 State youth correctional agencies. This evaluation, which has been ongoing since 1998, provides feedback to the project team (the Council of Juvenile Corrections Administrators, Abt Associates, project consultants, site coordinators, and OJJDP) regarding facilities' experiences with and perceptions of the PbS program and satisfaction with field support from project staff. The evaluator has contributed to numerous program improvements, including recommended strategies to reduce site coordinator turnover, revisions to the data collection instruments, the PbS Web site and training manuals, the development of the automated PbS Project Monitoring System, and exploration of the issues regarding data privacy.

Recent survey results from the national evaluation indicated initial positive findings in terms of both the adoption of the PbS model and improved performance outcomes within the facilities. Although nearly one-third of the facility respondents reported experiencing significant difficulties with initial implementation, there was a strong consensus among participating facilities that performance-based standards will ultimately be accepted and used in juvenile correction and detention facilities. The national evaluator is paying particular attention to the process and benefits of demonstration grants provided to assist facilities in carrying out specific aspects of the PbS program. FY 2001 will continue the formative evaluation of the PbS project as more facilities join the program and as critical components of the PbS program model are finalized and criteria for full implementation are specified. A final report will be developed on the national evaluation findings.

This program will be funded in FY 2001 under an interagency agreement with the Department of Commerce and implemented by the current grantee, the National Academy of Public Administration. No additional applications will be solicited in FY 2001.

Evaluation of SafeFutures

A national evaluation competitively awarded with FY 1995 funds is being conducted by the Urban Institute to determine the success of the SafeFutures initiative in creating a comprehensive continuum of care for youth in six participating sites (Boston, MA; Contra Costa County and Imperial County, CA; Fort Belknap, MT; Seattle, WA; and St. Louis, Missouri). The evaluation addresses the program implementation process and measures performance outcomes and lessons learned about the challenges and accomplishments across the six sites. A cross-site report will document the process of program implementation and community outcomes for use by other funding agencies or communities that want to develop and implement a comprehensive community-based strategy to address serious, violent, and chronic delinquency. FY 2001 is the final year of the 6-year project period.

The evaluation will be implemented by the current grantee, the Urban Institute. No additional applications will be solicited in FY 2001.

Juvenile Defender Training, Technical Assistance, and Resource Center

The Juvenile Defender Training, Technical Assistance, and Resource Center (Juvenile Defender Center), now in its second year of funding under a 5-year project period grant, was competitively awarded to the American Bar Association (ABA) in FY 1999. The Juvenile Defender Center fills a major gap in resources and support for juvenile defenders in the United States by providing training and technical assistance services. Nationally focused training and technical assistance for juvenile defenders did not exist before OJJDP funded the original Due Process Advocacy project from 1993 to 1999. Building on the Due Process Advocacy project, the Juvenile Defender Center project is designed to facilitate the development of a permanent training and technical assistance capability for juvenile defenders in the United States. Improving the capabilities and skills of juvenile defenders will strengthen the juvenile justice system and provide greater assurance that juveniles charged with delinquency will receive the due process and adequate representation they are guaranteed under the U.S. Constitution.

Over the past year, the ABA and its project partners (the Juvenile Law Center and the Youth Law Center) have completed planning for the implementation of the program, held the third National Juvenile Defenders Summit at Georgetown University Law School in Washington, DC, and participated in the planning and implementation of the Office of Justice Programs' National Defenders Conference in June 2000. In accordance with grant timelines, the ABA competitively selected and funded eight Regional Juvenile Defender Centers, designed to provide services to the juvenile defense bar on a regional level. The ABA also organized and held forums on representing female juvenile offenders and on representing juveniles who have mental health problems. The ABA and its project partners held the fourth Juvenile Defender Summit in Houston, TX, in October 2000. The ABA also continues to provide national technical assistance and materials to assist juvenile defenders with their cases. A unique funding mechanism, used for the first time with this grant program, provides incentive funds to the ABA to the extent it can raise additional funds in the private sector or obtain in-kind services. The ABA and its partners have been highly successful

in raising funds and obtaining donated resources. The success of these efforts underscores the importance of the juvenile defense issue to the private funding community.

This project will be continued in FY 2001 by the current grantee, the American Bar Association. No additional applications will be solicited in FY 2001.

Juvenile Justice Prosecution Unit

The goal of this project, first funded in FY 1995, is to increase and improve prosecutor involvement in juvenile justice. FY 2001 is the final year of the project period. The grantee, the American Prosecutors Research Institute (APRI), the training and technical assistance arm of the National District Attorneys Association, identifies prosecutor training and technical assistance needs in the juvenile justice area through ongoing assessment by a working group of experienced prosecutors. The project designs and presents specialized training events for elected and appointed district attorneys and juvenile unit chiefs. The training deals with prosecutor leadership roles in the juvenile justice system and with the clarification or resolution of important juvenile justice issues. Such issues include juvenile policy, code revisions, resource allocation, charging, transfer to criminal court, alternative juvenile programs, confinement, record confidentiality, and collaboration with other agencies. Training also addresses the role of other areas in juvenile justice, such as community prosecution, community justice, restorative justice, community assessment centers, and mental health concerns. In addition, APRI develops training and reference materials pertaining to significant juvenile justice topics.

The project has developed workshop and training materials and a ''Compendium of Programs'' operated or supported by prosecutor offices. The grantee presents six or more training events each year, including special issues seminars dealing with delinquency prevention, crime on campus, and other topics of interest to prosecutors. The project advisory group, made up of both chief and deputy prosecutors, advises APRI staff on training topics and also serves as training faculty.

Recent APRI training topics and workshops have included a ''train the trainer'' course; a Juvenile Justice Leadership Summit; a Juvenile Justice Track (a number of seminars) at the annual National District Attorneys Association conference and a Juvenile Justice Prosecution Track (a number of seminars) at the National Conference on Juvenile Justice; a Juvenile Justice Prosecution course with a distance learning component; and several additional workshops in conjunction with the Juvenile Accountability Incentive Block Grants Jumpstart program. Two special issues workshops are currently under development. Over the past year, APRI has trained more than 600 juvenile justice prosecutors. The APRI Juvenile Justice project also provides technical assistance, usually in the form of responses to requests for information on subjects related to juvenile justice.

This project will be implemented by the current grantee, the American Prosecutors Research Institute. No additional applications will be solicited in FY 2001.

Juvenile Residential Facility Census

OJJDP designed this new census to collect important information on facility characteristics, services provided in juvenile facilities, and conditions within those facilities. It provides a biennial census of residential facilities used by the juvenile justice system to hold youth accused of or adjudicated for an offense. The data collection forms will be mailed to each facility for completion by facility personnel. The Juvenile Residential Facility Census (JRFC) will collect information on health care services, mental health counseling or treatment, substance abuse treatment, and education. The questions in the census will also determine whether youth in the facility have access to the specific services (the methods used in the census cannot make evaluative statements on the quality of those services). The JRFC will also ask specific questions about the nature of the facility itself. It contains a series of questions that get at conditions of confinement. A series of questions on the number of beds used (including makeshift beds) permit some analysis of whether the facility (or part of the facility) is crowded. Other questions ask about the use of isolation or restraints. Finally, the JRFC will collect information on any deaths in custody. The census was tested in October 1998. The first full JRFC was sent out in October 2000. Data collection will continue through April 2001, and final data will be available in October 2001.

This project will be implemented through the extension of an existing interagency agreement with the Bureau of the Census, Governments Division and Statistical Research Division. No additional applications will be solicited in FY 2001.

Longitudinal Study To Examine the Development of Conduct Disorder in Girls

The purpose of this project, which began in FY 1998, is to examine the development of conduct disorder in a sample of 2,500 inner-city girls who were ages 6 to 8 at the beginning of the study. The study is following the girls annually for 5 years and will provide information that is critical to the understanding of the etiology, comorbidity, and prognosis of conduct disorder in girls. This project is important because delinquency in girls has been steadily increasing over the past decade and a better understanding of the developmental processes in girls will help in identifying effective means of prevention and provide direction for juvenile justice responses to delinquent girls. In the upcoming year, the program will continue data collection.

The project will be implemented under an interagency agreement with the National Institute of Mental Health by the current NIMH grantee, the University of Pittsburgh. No additional applications will be solicited in FY 2001.

National Juvenile Justice Data Analysis Project

In FY 1999, the National Juvenile Justice Data Analysis Project (NJJDAP) was funded to provide research and analysis into a wide variety of juvenile justice issues including juvenile placement, custody, arrests, victimization, and juvenile offending. However, the topics of interest to juvenile professionals are not limited to these typical justice topics. As research expands, the field is learning more and more about the intersection of between delinquency and other problems such as mental health disorders, education needs, and physical injury. Information about these problems can help in the design of effective prevention or intervention measures and also indicate what problems the justice system will face in dealing with delinquent youth. NJJDAP will examine issues of concern through cooperating with experts in related fields of interest and by using data collected in those fields. This project produces quick, unique analyses of these issues for publication by OJJDP. The intent is not to develop a unique research design for the individual questions. Rather, it is to address the individual questions within the context of existing data. Frequently, different data sets can be brought to bear on specific topics, giving a wider perspective on the particular topic at hand.

In the coming year—the third year of a 3-year project period, NJJDAP will expand its roster of available consultants who can provide either data analysis expertise or knowledge on particular aspects of adolescent development, juvenile delinquency, or the justice system. The NJJDAP will also broaden its reach for innovative data sets to State and local levels. Currently, the project has focused its energy on national data; however, as questions arise concerning school victimization or recidivism, it is apparent that only State-level data sets are suitable for such analyses.

This project will be implemented by the current grantee, the National Center for Juvenile Justice. No additional applications will be solicited in FY 2001.

National Juvenile Justice Program Directory

To conduct statistical projects, OJJDP and the Census Bureau require a support infrastructure that enables the necessary survey tasks to be performed efficiently and effectively. This infrastructure includes as a basic component the maintenance of a list or frame of all survey or sampling units. For example, the surveying of residential facilities could not take place without a list of such facilities. Indeed, as OJJDP moves toward surveying these facilities once a year, this list must be maintained continuously. Also, as the Office moves toward surveying juvenile probation offices, OJJDP and the Census Bureau will need a current list of all such offices in the United States. Other areas of interest might include juvenile courts, police departments, State agencies, etc. The maintenance of the lists includes contacting various key State and local officials or practitioners who can provide the names of agencies or facilities associated with their respective agencies. It also requires maintaining current contact information for these agencies or facilities. Finally, it requires developing and updating a database of these facilities that contains information necessary for sampling or stratification purposes. This ongoing project fills the need for lists of juvenile agencies, programs, and facilities.

This project will be conducted under an extension to an existing interagency agreement with the Bureau of the Census, Governments Division. No additional applications will be solicited in FY 2001.

The National Longitudinal Survey of Youth 97

OJJDP will continue to support the third round of data collection, begun in FY 1997, by the National Longitudinal Survey of Youth 97 (NLSY97) under an interagency agreement with the Bureau of Labor Statistics (BLS). The NLSY97 is studying school-to-work transition in a nationally representative sample of 8,700 youth ages 12 to 16 years old. BLS is also collecting data on the involvement of these youth in antisocial and other behavior that may affect their transition to productive work careers. The survey will provide information about risk and protective factors related to the initiation, persistence, and desistance of delinquent and criminal behavior and provides an opportunity to determine the generalizability of findings from OJJDP's Program of Research on the Causes and Correlates of Delinquency and other longitudinal studies to a nationally representative population of youth.

The program will be implemented through the extension of an existing interagency agreement with the Bureau of Labor Statistics. No additional applications will be solicited in FY 2001.

Performance-Based Standards for Juvenile Correction and Detention Facilities

Performance-Based Standards (PbS) for Juvenile Correction and Detention Facilities is a program that began with a competitive cooperative agreement awarded to the Council of Juvenile Correctional Administrators (CJCA) in FY 1995. The PbS project team (CJCA, Abt Associates, and OJJDP) has created a performance management system for juvenile facilities that emphasizes accountability and continuous improvement. In 1999, 32 facilities (22 correctional facilities, 8 detention centers, and 2 reception/diagnostic centers), with statewide participation by 3 State juvenile correctional systems, engaged in the PbS implementation process. Eighteen of the facilities received demonstration funds to support program implementation functions or to fund specific activities related to facility improvement plans for particular areas targeted for improvement.

During FY 2000, 26 new facilities, from 8 additional States, began the full implementation process. In addition, the program underwent significant refinements to improve the implementation process. To reduce turnover among facility site coordinators and to ensure a full understanding of all aspects of the PbS program, the new sites were provided both orientation training and additional onsite technical assistance in using the streamlined data collection (via a secure Web site), interpreting performance results, and developing facility improvement plans.

During the past year, the PbS project team finalized the *PbS User's Manual*; revised instruments and related tools on the Web site, including the Site Reports that are sent back to the facilities; developed and implemented data quality assurance protocols; and drafted and revised resource guides on juvenile sex offenders, mental health services, and behavior management. The project also extended the scope of performance measures to community reintegration functions for correctional programs, which are critical both within the institution and in the community. To gain direct experience with model community reintegration programs and to inform the development of performance measures, two PbS State systems participated in statewide training on the Intensive Aftercare Program. Finally, a new automated PbS Project Monitoring System was designed to manage more efficiently the overall PbS program implementation and to better track and analyze facility outcome results in particular areas of concern.

FY 2001 funding will provide the resources needed for onsite training, technical and financial assistance, and data quality assurance assessments for the additional facilities currently receiving only limited support and continued support of two additional rounds of reporting for all sites. The performance measures and data collection tools for the community reintegration component will be field tested and incorporated into the Site Reports and Facility Improvement Plans. Additional technical and financial assistance will be provided for the development or modification of State Agency management information systems to accommodate reporting requirements for more fluid integration with online management reporting. The project will also complete the revisions of staff and youth interview protocols and related data collection and reporting components so that they are compatible with the final design of OJJDP's new Survey of Youth in Residential Placement instrument. This will allow for future comparison of results from the sites participating in this project with a national sample of youth facilities. Also, a series of research summaries regarding performance trends and improvements in various domains will be developed to inform the field about promising practices in improving specific outcomes.

This program will be implemented by the current grantee, the Council of

Juvenile Correctional Administrators. No additional applications will be solicited in FY 2001.

Study Group on Very Young Offenders

Modeled after the OJJDP Study Group on Serious and Violent Juvenile Offenders, this project is exploring what is known about the prevalence and frequency of very young (under the age of 13) offending. In FY 1998, OJJDP supplemented a grant to the University of Pittsburgh, the grantee for the Study Group on Serious and Violent Juvenile Offenders. The Study Group on Very Young Offenders is examining whether such offending predicts future delinquent or criminal careers, how these youth are handled by various systems including juvenile justice, mental health, and social services; and what methods are best for preventing very young offending and persistence of offending. In FY 2001, the project will disseminate the results of its research to the public, policymakers, and practitioners.

This program will be implemented by the current grantee, the Western Psychiatric Institute and Clinic at the University of Pittsburgh. No additional applications will be solicited in FY 2001.

Systems Improvement Training and Technical Assistance

In FY 1999, OJJDP competitively awarded funds to the Institute for Educational Leadership (IEL) to provide training and technical assistance to strengthen and sustain the capacity of SafeFutures and Safe Kids/Safe Streets demonstration sites in order to assist them with systems change activities. The project seeks to help sites (1) address their system goals and effectively address challenges, (2) educate and inform other communities and the juvenile justice field about how they can more effectively pursue community-based systems reform, (3) enhance the skills of community and staff leadership so they are better able to sort through the complexities of systems reform, and (4) build the overall capacity of the selected sites to engage in strategic planning, develop policies and programs, and build community collaboratives to address specific substantive challenges and achieve measurable results.

Since the project was awarded, IEL has established a pool of consultants with expertise in areas related to systems improvement activities; developed resources useful to communities addressing issues critical to systems improvement, including using data effectively, achieving sustainability, and building consumer capacity and cultural competence; and provided assistance to Safe Kids/Safe Streets sites.

In FY 2001, OJJDP will continue to fund the project in order to further provide assistance to selected OJJDP grantee communities interested in systems reform and change and to begin disseminating ''lessons learned'' to other communities.

This project will be implemented by the current grantee, Institute for Educational Leadership. No additional applications will be solicited in FY 2001.

Survey of Juvenile Probation

This project will design a survey instrument and survey methodology that OJJDP can use to routinely monitor the number and types of juveniles on probation. Probation has been an understudied segment of the juvenile justice system, yet it has been described as the workhorse of that system. OJJDP began this project in 1997 through an interagency agreement with the U.S. Census Bureau. The project has several phases. The first phase includes open-ended structured interviews with probation officers at the State and local levels in 10 States. Based on these interviews, the Census Bureau and OJJDP will develop a draft instrument designed to collect contact information for each office as well as stratifying information (*e.g.,* number of youth supervised, number of officers, etc.). Phase II will include both cognitive interviews to test this first instrument (intended to be a census of probation offices) and structured interviews for the development of the probation survey. Based on these interviews, the Center for Survey Methods Research and the Governments Division of the Census Bureau will develop a feasibility test. This test will examine how well the forms work in collecting the necessary information from a small number of States. Phase III will include the development of the survey instrument and cognitive tests of this instrument in a number of probation offices. The final phase, Phase IV, will consist of a feasibility test of the final survey instrument. The Center for Survey Methods Research has completed Phase I of this project and will deliver to OJJDP a draft instrument in early 2001. Phase II of the project will start shortly after that point. OJJDP anticipates the first Survey of Juvenile Probation will take place in calendar year 2002.

This project will be conducted through an interagency agreement with the Bureau of the Census. No additional applications will be solicited in FY 2001.

Technical Assistance to Native American Tribes and Alaskan Native Communities

The Technical Assistance to Native American Tribes and Alaskan Native Communities project is designed to equip tribal governments with the necessary information and tools to enhance or develop comprehensive, systemwide approaches to reduce juvenile delinquency, violence, and victimization and increase the safety of their communities. In FY 1997, OJJDP awarded a 3-year cooperative agreement to American Indian Development Associates (AIDA) to provide training and technical assistance to Indian nations seeking to improve juvenile justice services to children, youth, and families.

Throughout FY's 1998 and 1999, AIDA continued to provide technical assistance to Indian nations and developed information materials for Indian juvenile justice practitioners, administrators, and policymakers. Topic areas covered Indian youth gangs; personnel competency building, such as conducting effective preadjudication investigations and preparing reports; developing protocols to implement Tribal Children's Code provisions that affect Native American children; establishing sustainable, comprehensive community-based planning processes that focus on the needs of tribal youth; and developing and implementing culturally relevant policies, programs, and practices. The technical assistance and materials also addressed the overlapping roles and jurisdiction of Federal, State, and tribal justice systems, particularly in understanding the laws and public policies applicable to or effective in Indian communities.

AIDA recorded 74 training and technical assistance events in FY 2000, including 33 workshops. Technical assistance provided to the Indian nations included juvenile justice systems planning development, early intervention program training, application of indigenous justice and restorative justice practices, focus group processes and methodology, needs assessment development, and data collection. Three of the completed projects had multiregional representation, and five of the completed projects had a wider tribal representation. The Indian nations were from 6 regions: Midwest (8), Northwest (2), South Central (3), Southeast (2), and Southwest (10). Some projects featured collaboration with State and Federal organizations, bureaus, and agencies.

In FY 2001, AIDA will provide continuing training and technical assistance to tribes seeking to develop and enhance their juvenile justice systems with emphasis in the following areas: developing a community-based secondary prevention program, developing a tribal justice probation system, developing multidisciplinary approaches to youth gang violence prevention, establishing risk assessment and classification systems, developing comprehensive strategies to handle offenders, expanding referral and service delivery systems, developing cooperative interagency and intergovernmental relationships, and developing technology to improve systems and increased access to juvenile justice information.

A new solicitation will be issued and a grant awarded through a competitive process in FY 2001.

TeenSupreme Career Preparation Initiative

In FY 1998, OJJDP, in partnership with the U.S. Department of Labor's (DOL's) Employment and Training Administration, provided funding support to the Boys & Girls Clubs of America to demonstrate and evaluate the TeenSupreme Career Preparation Initiative. This initiative provides employment training and other related services to at-risk youth through local Boys & Girls Clubs with TeenSupreme Centers. In FY 2001, DOL will transfer funds to OJJDP to support program staffing in 41 existing TeenSupreme Centers. These 41 clubs have hired employment specialists to work with up to 120 youth. Boys & Girls Clubs of America provides intensive training and technical assistance to each site and administrative and staffing support to the program from its national office. OJJDP funds support the process and impact evaluation component of the program, which is being implemented by an independent evaluator. In FY 2001, the Boys & Girls Clubs of America, with DOL funds, will select new career preparation sites. OJJDP will continue supporting the evaluation component.

This TeenSupreme initiative will be implemented by the current grantee, the Boys & Girls Clubs of America. No additional applications will be solicited in FY 2001.

Child Abuse and Neglect and Dependency Courts

National Evaluation of the Safe Kids/Safe Streets Program

OJJDP will continue funding the grant competitively awarded in FY 1997 to Westat, Inc., Rockville, MD, for the National Evaluation of the Safe Kids/Safe Streets Program. The evaluation has three main goals: to document and explicate the process of community mobilization, planning, and collaboration taking place before and during the Safe Kids/Safe Streets award; to inform program staff of performance levels on an ongoing basis; and to determine the effectiveness of the implemented programs in achieving the goals of the Safe Kids/Safe Streets program. The initial 18-month grant began a process evaluation and a feasibility study for a future impact evaluation. In FY 2001—the fifth year of a 5-year project period, Westat will continue the process evaluation, which will focus on tracking the implementation efforts at each of the sites, and will continue working with local evaluators to develop their skills and capacity for program evaluation. Westat has recently submitted a plan for the impact evaluation, which includes a pilot study of their proposed case tracking procedure.

This evaluation will be implemented by the current grantee, Westat, Inc. No additional applications will be solicited in FY 2001.

Safe Kids/Safe Streets: Community Approaches To Reducing Abuse and Neglect and Preventing Delinquency

This 5-year demonstration is designed to break the cycle of early childhood victimization and later delinquency and criminality by reducing child and adolescent maltreatment and fatalities. Several components of the Office of Justice Programs joined in FY 1996 to develop this coordinated community response program. These components provide fiscal and technical support for local efforts to restructure and strengthen the justice system and the child welfare, family services, education, health, and related systems to be more comprehensive and proactive in helping children, adolescents, and their families. Safe Kids requires the five funded sites to develop, implement, and/or expand cross-agency strategies and to partner with natural networks in their communities. OJJDP awarded competitive cooperative agreements in FY 1997 to five sites (Chittenden County, VT; Huntsville, AL; Kansas City, MO; the Sault Ste. Marie Tribe of Chippewa Indians, MI; and Toledo, OH). Funds were provided by OJJDP, the Executive Office for Weed and Seed, and the Violence Against Women Office. FY 2001 is the fourth year of a 5-year project period.

This demonstration will continue to be implemented in FY 2001 by the current grantees: Chittenden County, VT; Huntsville, AL; Kansas City, MO; the Sault Ste. Marie Tribe of Chippewa Indians, MI; and Toledo, OH. No additional applications will be solicited in FY 2001.

Dated: December 12, 2000.

John J. Wilson,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

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Federal Register

Tuesday,
December 19, 2000

Part V

Department of Housing and Urban Development

Notice of Public and Indian Housing: Access Housing 2000 Initiative; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4641–N–01]

Notice of Public and Indian Housing: Access Housing 2000 Initiative

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of proposed national initiative—access housing 2000.

SUMMARY: This notice provides information on Access Housing 2000, a proposed national initiative that will assist persons with disabilities to transition from nursing homes into the community by providing improved access to affordable housing and necessary personal assistance and supportive services. HUD is partnering with the U.S. Department of Health and Human Services (HHS) and the Institute on Disability (IOD) at the University of New Hampshire to carry out this initiative.

Using Section 8 housing vouchers in conjunction with supportive services available under the Medicaid program, the proposed initiative presents an opportunity to design and implement innovative housing and supportive service strategies. If successful, these strategies could expand the availability of accessible, affordable housing in the United States, including homeownership opportunities for persons with disabilities, and assure that such individuals receive the assistance and the ongoing supportive services necessary to make a smooth and successful transition to living in the community.

DATES: Comments Due Date: February 20, 2000.

ADDRESSEES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Rod Solomon, Deputy Assistant Secretary, Office of Policy, Program and Legislative Initiatives, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh St., SW, Room 4116, Washington, DC 20410; telephone (202) 708–0713 (this is not a toll-free number). Persons with hearing or speech impairments may access that number via TTY by calling the Federal Information Relay Services at (800) 877–8339.

I. Introduction

On July 26, 2000, the Administration announced several new initiatives designed to promote the delivery of home and community-based services for persons with disabilities of all ages. These initiatives are part of the tenth anniversary of the passage of the Americans with Disabilities Act of 1990 (ADA). One of these initiatives is Access Housing 2000, a unique partnership focusing on providing a national coordinated response to the Supreme Court's decision in *Olmstead* v. *L.C.* (527 U.S. 581 (1999)). That decision, issued on June 22, 1999, was a result of a lawsuit brought by two mentally disabled women who sought placement in the community rather than being institutionalized at a hospital psychiatric unit. The decision concluded that under the ADA, states are required to provide services to persons with disabilities in community settings rather than institutions when treatment professionals determine that community placement is appropriate, the individual does not object to this determination, and it can be reasonably accommodated.

At the heart of Access Housing 2000 is a proposed five-year national initiative designed to serve as an approach for using existing federal authority and appropriations to facilitate the successful transition from nursing homes to community living for persons with disabilities. This initiative will begin with approximately 400 beneficiaries residing in targeted regions, with a goal, depending upon available resources, of reaching 2000 beneficiaries at its full implementation. Participants will include persons with disabilities who have very low incomes and who currently reside in nursing homes. The initiative is targeted to reach a broad geographic sweep of up to forty states and territories at full implementation, with a goal of approximately fifty beneficiaries per state or territory. The initiative will use HUD Section 8 housing vouchers, HHS Nursing Home Transition Grants, Medicaid funds, and other resources to better help persons with disabilities make the transition from nursing homes to community living.

HUD is promulgating this Notice pursuant to section 470 of the Housing and Urban-Rural Recovery Act of 1983 (Pub. L. 98–181), which states that no HUD demonstration program not expressly authorized in law may begin until a description of the program is published in the **Federal Register**, and that a comment period of 60 calendar days following the date of publication shall be provided, in which the Secretary shall fully consider any public comments submitted with respect to the program.

II. Design of the Initiative

A. HUD's Responsibilities

HUD's responsibilities under the proposed national initiative include the provision of Section 8 vouchers to selected PHAs, which will partner with State Medicaid agencies in order to assist persons with disabilities in transitioning from nursing homes into the community. HUD will make available, through its funding award process, approximately $2.5 million initially to fund 400 Section 8 vouchers targeted for use by persons with disabilities and families of children with disabilities who currently reside in nursing homes. On August 10, 2000, HUD published a notice in the **Federal Register** (65 FR 49003) which informed the public that it intends to use a portion of the remaining unobligated Fiscal Year 2000 funds from two Section 8 voucher programs—*Rental Assistance for Non-Elderly Persons with Disabilities Related to Certain Types of Section 8 Project-Based Developments and Section 202, 221(d) and 236 Developments* (Certain Developments) and *Rental Assistance for Non-Elderly Persons with Disabilities in Support of Designated Housing Plans* (Designated Housing)—for this initiative. The vouchers will be administered by the selected PHAs and will be used by persons with disabilities to rent apartments in privately-owned buildings, assisted living facilities, or residential facilities, or to eventually own accessible and affordable homes. Subject to appropriations, HUD also will provide technical assistance to the selected sites.

In the proposed initiative's first year, approximately ten PHAs will receive Section 8 vouchers. It is expected that for at least half of the PHAs chosen for the initiative, vouchers will be used in conjunction with HHS Nursing Home Transition grants, which are administered by State Medicaid agencies, and support states in identifying and assisting current nursing home residents who wish to transition to home and community-based settings. The remaining PHAs will draw upon State and local resources. (See Section

II.C.—*PHA, State Medicaid Agency, and Joint Responsibilities*—for further requirements applicable to these entities.) Working in consultation with HHS and IOD, HUD will select the sites that will receive the Section 8 vouchers. Although HUD is not undertaking a competition between PHAs for the available vouchers, interested PHAs may submit in writing to HUD, during the comment period, any reasons they have for desiring to become part of the initiative, including their capacity to undertake such a project and the specific steps they have taken or will take to coordinate with State Medicaid agencies, so that these agencies will fulfill the responsibilities described for them in this Notice.

B. HHS's Responsibilities

HHS's responsibilities under the proposed national initiative include the provision of Nursing Home Transition (NHT) Grants to selected State Medicaid agencies. These grants focus on assuring that persons leaving nursing homes will have adequate personal assistance services and support to meet their needs. HHS's intent with its Nursing Home Transition Grant program is to foster the development and sharing of innovative and effective methods to eliminate the barriers that prevent beneficiaries from living independently in their own homes and communities. In Fiscal Year 2000, four State Medicaid agencies each received first-time Nursing Home Transition grants in the amount of $500,000. It is expected that Congress will provide HHS with increased funding for another round of Nursing Home Transition grants in Fiscal Year 2001 as well. Subject to appropriations, HHS also will provide technical assistance to the selected sites.

C. PHA, State Medicaid Agency, and Joint Responsibilities

PHA Responsibilities. PHAs that are selected for the initiative will be responsible for administering the Section 8 vouchers. The usual voucher program requirements will apply. Those PHAs that receive vouchers to be used in conjunction with Nursing Home Transition grants administered by State Medicaid agencies must demonstrate the commitment and capacity to coordinate and work with these Medicaid agencies, as well as independent living centers and other organizations to facilitate the use of the initiative's Section 8 vouchers by persons with disabilities leaving nursing homes.

PHAs that are located in States whose Medicaid agencies did not receive nursing home transition grants still may qualify to obtain housing vouchers through this initiative by demonstrating the ability to meet the preceding criteria. It should be noted that PHAs in States taking this course will need to show that they will be able to use available Medicaid, State, and local resources to carry out transition-related activities. HHS will provide additional details on how State Medicaid agencies in both categories—those that receive nursing home transition grants and those that do not have such funding—can express interest in participating with PHAs that receive vouchers under this initiative (either from the 400 vouchers currently available or from any vouchers that may be made available in the future for this purpose) in HHS's upcoming Fiscal Year 2001 Request For Proposals (RFP) regarding this grant program. HHS will also communicate with State Medicaid agencies regarding the Access Housing 2000 initiative.

State Medicaid Agency Responsibilities. A State Medicaid agency will be considered for participation in the Access Housing 2000 initiative if it demonstrates a clear commitment and capacity in the areas of (1) collaborating and coordinating with PHAs and other agencies, (2) assuring that a nursing home resident has a choice about whether to transition from a nursing home into the community and the services and activities that are provided, and (3) strengthening and improving community-based supportive services.

Interagency collaboration and coordination. State Medicaid agencies will be expected to demonstrate the commitment and capacity to:

- Actively foster and engage in collaborative efforts with PHAs, independent living centers, and other organizations in order to identify and implement strategies for obtaining accessible, affordable housing and supportive services for those leaving nursing homes;
- Assure the meaningful participation of persons with disabilities (including current and former nursing home residents) and others in the design and implementation of a comprehensive, effective plan for transitioning individuals from nursing homes, both during and after the grant period, in an attempt to improve access to home- and community-based services to those needing such services.

Nursing home residents' choice. State Medicaid agencies will be expected to demonstrate the commitment and capacity to:

- Identify and educate nursing home residents and their families about the alternatives available to them should the resident desire to return to the community.
- Assure that each resident (or legal guardian acting on their behalf) has the opportunity, information, and tools to make an informed choice about whether to transition into the community or remain in a nursing home.
- Assure that those residents who choose to transition into the community have maximum possible control over individualized budgeting, planning, and coordination activities.
- Overcome any resistance and barriers which may impede a resident's decision to exercise his or her choice to transition into the community.

Strengthening and improving community-based supportive services. State Medicaid agencies will be expected to demonstrate the commitment and capacity to:

- Ensure that individuals leaving nursing homes for community living arrangements will receive the necessary ongoing supportive services that will allow these individuals to remain in their communities.
- Tap the experience of independent living centers, area agencies on aging, and similar networks in identifying and transitioning persons with disabilities from nursing homes into their communities (through the use of formal agreements, etc.).
- Work with other organizations to develop the necessary community infrastructure and supports to enable former nursing home residents to live safely and with dignity in their communities.
- Work with PHAs and other housing organizations to identify and/or modify housing that is or can be made to be accessible and affordable within a reasonable distance of a person's family or social support network.

Joint Responsibilities. PHAs and State Medicaid agencies also must coordinate and work with one another and with other resources—both public and private—within their communities to facilitate the use of the initiative's vouchers by persons with disabilities leaving nursing homes and to ensure the success of this initiative. It is expected that a Memorandum of Understanding or some other basic agreement between the PHA and the State Medicaid agency, describing specific roles, responsibilities, and activities to be undertaken by the parties, would be prepared at the outset.

In addition, PHAs and State Medicaid agencies that participate in the proposed national initiative will be expected to work with HUD, HHS, and IOD by: (1) Joining local coalitions created to build ground-level support for the initiative

and to assist in its implementation; (2) participating in case studies aimed at understanding the effectiveness of strategies developed during the initiative and disseminating best practices; (3) contributing to research that examines the process for, benefits of, and barriers to the implementation and accomplishment of the objectives of Access Housing 2000; (4) taking part in determining whether the strategies developed during the initiative can be replicated on a large-scale basis; and (5) cooperating with the analysis of Federal and State policy affecting the implementation of this initiative.

D. IOD's Responsibilities

Subject to the availability of resources and to further definition by HUD and HHS, IOD will create a center to: (1) Build broad-based partnerships and collaborations in both the public, private, and advocacy sectors; (2) conduct outreach to create local coalitions consisting of public, private, and advocacy organizations to build ground-level support for the initiative and to assist in its implementation; (3) evaluate the efficacy of the strategies developed during the initiative and the dissemination of best practices; (4) conduct research that examines the process for, benefits of, and barriers to the implementation and accomplishment of the objectives of Access Housing 2000; (5) examine whether the strategies developed during the initiative can be replicated on a large-scale basis; (6) analyze Federal and State policy affecting the implementation of this initiative; (7) develop a means of ensuring that the experience of the initiative receives broad attention and review, *e.g.* creating a website.

Dated: December 13, 2000.

Harold Lucas,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 00–32259 Filed 12–14–00; 1:11 pm]

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Federal Register

Tuesday,

December 19, 2000

Part VI

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 8 and 51

Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8 and 51

[FAR Case 1999–614]

RIN 9000–AJO1

Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to add policies on disputes and incidental items under Federal Supply Schedule contracts and to remove the requirement to notify the General Services Administration when a schedule contractor refuses to honor an order placed by a Government contractor.

DATES: Interested parties should submit comments in writing on or before February 20, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.1999-614@gsa.gov

Please submit comments only and cite FAR case 1999–614 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAR case 1999–614.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule—

- Adds to FAR 8.401 policy regarding incorporating incidental supplies or services that are not included in the schedule contract into an order placed against the schedule contract;
- Revises FAR 8.405–7 to permit the ordering office contracting officer to issue a final decision regarding disputes pertaining solely to performance of schedule orders;
- Deletes FAR 51.103(b) because agencies are no longer required to notify the General Services Administration when a Federal Supply Schedule contractor refuses to honor an order placed by a Government contractor under an agency authorization.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses internal Government administrative procedures and does not impose any additional requirements on Government offerors or contractors. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 1999–614), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 8 and 51

Government procurement.

Dated: December 13, 2000.

Al Matera,

Acting Director, Federal Acquisition, Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 8 and 51 be amended as set forth below:

1. The authority citation for 48 CFR parts 8 and 51 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Amend section 8.401 by adding paragraph (d) to read as follows:

8.401 General.

* * * * *

(d) For administrative convenience, an ordering office contracting officer may add open market (noncontract) items to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if—

(1) All applicable acquisition regulations have been followed (*e.g.*, publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (Part 12), and contracting methods (Parts 13, 14, and 15));

(2) The ordering office contracting officer has determined the price for the open market items is reasonable; and

(3) The items are clearly labeled as open market (noncontract) items on the order.

3. Revise section 8.405–7 to read as follows:

8.405–7 Disputes.

(a) *Disputes pertaining to the performance of orders under a schedule contract.* (1) Under the Disputes clause of the schedule contract, the ordering office contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b)); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering office contracting officer must notify the schedule contracting officer promptly of any final decision.

(b) *Disputes pertaining to the terms and conditions of schedule contracts.* The ordering office contracting officer must refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) *Appeals.* Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

(d) *Alternative dispute resolution.* The contracting officer should use the alternative dispute resolution (ADR) procedures, when appropriate (see 33.214).

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

51.103 [Amended]

4. Amend section 51.103 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

[FR Doc. 00–32235 Filed 12–18–00; 8:45 am]

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Federal Register

Tuesday,

December 19, 2000

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Part 25

Fire Protection Requirements for Powerplant Installations on Transport Category; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No.: FAA–2000–7471; Amendment No. 25–101]

RIN 2120–AG94

Fire Protection Requirements for Powerplant Installations on Transport Category Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The Federal Aviation Administration amends the airworthiness standards for transport category airplanes to establish a new requirement for fire protection of powerplant installations. This amendment requires that components within a designated fire zone must be fireproof if, when exposed to or damaged by fire, they could pose a hazard to the airplane. Issuing this amendment eliminates regulatory differences between the airworthiness standards of the U.S. and the Joint Aviation Requirements of Europe, without affecting current industry design practices.

DATES: Effective January 18, 2001.

FOR FURTHER INFORMATION CONTACT: Michael K. McRae, Propulsion/Mechanical Systems Branch, ANM–112, Transport Airplane Directorate, Aircraft Certification Service, FAA, Northwest Mountain Region, 1601 Lind Avenue S.W., Renton, Washington 98055–4056; telephone (425) 227–2133; facsimile (425) 227–1320; e-mail: mike.mcrae@faa.gov.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (http://dms.dot.gov/search).

(2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on ''search.''

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the document number for the item you wish to view.

You can also get an electronic copy using the Internet through FAA's web page at http://www.faa.gov/avr/arm/nprm.htm or the **Federal Register's** web page at http://www.access.gpo.gov/su_docs/ aces/aces140.html.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBRFA on the Internet at our site, http://www.gov/avr/arm/sbrefa.htm. For more information on SBREFA, e-mail us at 9-AWA-SBREFA@faa.gov.

Background

What Are the Relevant Airworthiness Standards in the United States?

In the United States, Title 14, Code of Federal Regulations (CFR) part 25 contains the airworthiness standards for type certification of transport category airplanes. Manufactures of transport category airplanes must show that each airplane they produce of a different type design complies with the appropriate part 25 standards. These standards apply to:

- Airplanes manufactured within the U.S. for use by U.S.-registered operators, and
- Airplanes manufactured in other countries and imported to the U.S. under a bilateral airworthiness agreement.

What Are the Relevant Airworthiness Standards in Europe?

In Europe, Joint Aviation Requirements (JAR)–25 contains the airworthiness standards for type certification of transport category airplanes. The Joint Aviation Authorities (JAA) of Europe developed these standards, which are based on part 25, to provide a common set of airworthiness standards within the European aviation community. Twenty-three European countries accept airplanes type certificated to the JAR–25 standards, including airplanes manufactured in the U.S. that are type certificated to JAR–25 standards for export to Europe.

What is ''Harmonization'' and How Did It Start?

Although part 25 and JAR–25 are similar, they are not identical in every respect. When airplanes are type certificated to both sets of standards, the differences between part 25 and JAR–25 can result in substantial added costs to manufacturers and operators. These added costs, however, often do not bring about an increase in safety. In many cases, part 25 and JAR–25 may contain different requirements to accomplish the same safety intent. Consequently, manufacturers are usually burdened with meeting the requirements of both sets of standards, although the level of safety is not increased correspondingly.

Recognizing that a common set of standards would not only benefit the aviation industry economically, but also preserve the necessary high level of safety, the FAA and the JAA began an effort in 1988 to ''harmonize'' their respective aviation standards. The goal of the harmonization effort is to ensure that:

- Where possible, standards do not require domestic and foreign parties to manufacture or operate to different standards for each country involved; and
- The standards adopted are mutually acceptable to the FAA and the foreign aviation authorities.

The FAA and JAA have identified many significant regulatory differences (SRD) between the wording of part 25 and JAR–25. Both the FAA and the JAA consider ''harmonization'' of the two sets of standards a high priority.

What Is ARAC and What Role Does It Play in Harmonization?

After beginning the first steps towards harmonization, the FAA and JAA soon realized that traditional methods of rulemaking and accommodating different administration procedures was neither sufficient nor adequate to make noticeable progress towards fulfilling the goal of harmonization. The FAA then identified the Aviation Rulemaking Advisory Committee (ARAC) as an ideal vehicle for helping to resolve harmonization issues, and, in 1992, the FAA tasked ARAC to undertake the entire harmonization effort.

The FAA had formally established ARAC in 1991 (56 FR 2190, January 22, 1991), to provide advice and recommendations on the full range of the FAA's safety-related rulemaking activity. The FAA sought this advice to develop better rules in less overall time and using fewer FAA resources than

previously needed. The committee provides the FAA firsthand information and insight from interested parties on potential new rules or revisions of existing rules.

There are 64 member organizations on the committee, representing a wide range of interests within the aviation community. Meetings of the committee are open to the public, except as authorization by section 10(d) of the Federal Advisory Committee Act.

The ARAC sets up working groups to develop recommendations for resolving specific airworthiness issues. Tasks assigned to working groups are published in the **Federal Register**. Although working group meetings are not generally open to the public, the FAA invites participation in working groups from interested members of the public who have knowledge or experience in the task areas. Working groups report directly to the ARAC, and the ARAC must accept a working group proposal before ARAC presents the proposal to the FAA as an advisory committee recommendation.

The activities of the ARAC will not, however, circumvent the public rulemaking procedures; nor is the FAA limited to the rule language ''recommended'' by ARAC . If the FAA accepts an ARAC recommendation, the agency continues with the normal public rulemaking procedures. Any ARAC participation in a rule making package is fully disclosed in the public docket.

What Is the Status of the Harmonization Effort Today?

Despite the work that ARAC has undertaken to address harmonization, there remain many regulatory differences between part 25 and JAR–25. The current harmonization process is costly and time-consuming for industry, the FAA, and the JAA. Industry has expressed a strong desire to finish the harmonization program as quickly as possible to relieve the drain on their resources and to finally establish one acceptable set of standards.

Recently, representatives of the aviation industry [including Aerospace Industries Association of America, Inc. (AIA), General Aviation Manufacturers Association (GAMA), and European Association of Aerospace Industries (AECMA)] proposed an accelerated process to reach harmonization.

What Is the ''Fast Track Harmonization Program''?

In light of a general agreement among the affected industries and authorities to speed up the harmonization program, the FAA and JAA in March 1999 agreed on a method to achieve these goals. This method, titled ''The Fast Track Harmonization Program,'' seeks to speed up the rulemaking process for harmonizing not only the 42 standards that are currently tasked to ARAC for harmonization, but nearly 80 additional standards for part 25 airplanes.

The FAA launched the Fast Track program on November 26, 1999 (64 FR 66522). This program involves grouping all the standards needing harmonization into three categories:

Category 1: Envelope—For these standards, parallel part 25 and JAR–25 standards would be compared, and harmonization would be reached by accepting the more stringent of the two standards. Thus, the more stringent requirement of one standard would be ''enveloped'' into the other standard. Occasionally, it may be necessary to incorporate parts of both the part 25 and JAR standard to achieve the final, more stringent standard. (This may call for each authority revising its current standard to incorporate more stringent provisions of the other.)

Category 2: Completed or near complete—For these standards, ARAC has reached, or has nearly reached, technical agreement or consensus on the new wording of the proposed harmonized standards.

Category 3: Harmonize—For these standards, ARAC is not near technical agreement on harmonization, and the parallel part 25 and JAR–25 standards cannot be ''enveloped'' (as described under Category 1) for reasons for safety or unacceptability. A standard developed under Category 3 would be mutually acceptable to the FAA and JAA, with a consistent means of compliance.

Further details on the Fast Track Program can be found in the tasking statement (64 FR 66522, November 26, 1999) and the preamble to the notice for this amendment (65 FR 36978, June 12, 2000).

How Does This Amendment Relate to ''Fast Track''?

This amendment results from recommendations that ARAC submitted to the FAA under the FAA's Fast Track Harmonization Program. This rulemaking project has been identified as a Category 2 item.

What Did the FAA Propose?

On June 1, 2000 (65 FR 36983, June 12, 2000), the FAA proposed to revise § 25.1183 to include an extra paragraph that currently appears in the parallel JAR 25.1183 as paragraph (c). That paragraph states:

''(c) components, including ducts, within a designated fire zone must be fireproof if, when exposed to or damaged by fire, they could—

(1) Result in fire spreading to other regions of the airplane; or

(2) Cause unintentional operation of, or inability to operate, essential services or equipment.''

The FAA considers adding this paragraph to part 25 necessary to:

- Harmonize the text of part 25 with the JAR on this particular issue,
- Clarify the intent of the part 25 regulation, and
- Provide extra assurance that all ''components'' that need to be fireproof will be identified and qualified during certification.

Adding § 25.1183(c) in part 25 aligns the U.S. regulations with their European counterparts, and the words of both airworthiness standards will be exactly parallel. Adoption of this amendment benefits the public interest by standardizing the requirements, concepts, and procedures contained in the U.S. and European airworthiness standards without reducing the current level of safety.

What Is the Effect of This New Requirement on Other Current Regulations?

The FAA recognizes that this added requirement might seem redundant to other existing part 25 sections, including:

1. *Section 25.1181 (''Designated fire zones; regions included''):* This section identifies which areas of the powerplant installation are ''fire zones,'' including the engine power section, the engine accessory section, and the auxiliary power unit (APU) compartment. It also requires that each of these fire zones meet the fire protection requirements of:

- § 25.867 (pertaining to components of the nacelles); and
- § 25.1185 through § 25.1203 (pertaining to flammable fluids, drainage and ventilation of fire zones, means of fuel shutoff, fire extinguishing systems and agents, fire detection systems, etc.).

2. *Section 25.1191 (''Firewalls''):* This section requires that each engine, APU, fuel-burning heater, and other components and areas of the (turbine) engine be isolated from the rest of the airplane by firewalls or other equivalent means. It also requires that each firewall be:

- Fireproof,
- Leakproof (so no hazardous quantity of air, fluid, or flame can pass from the compartment),
- Sealed (so all openings are sealed with close fitting fireproof fasteners), and

• Protected against corrosion.

3. *Section 25.901(c) (''Powerplant, General—Installation''):* This section requires that each powerplant and APU installation be designed so no single failure, malfunction, or combination of failures will jeopardize the safe operation of the airplane. (It also specifies that the failure of structural elements need not be considered if the applicant determines the probability of such failure to be extremely remote.)

While these regulations may seem redundant *in effect* to the new paragraph 25.1183(c), the FAA considers it valuable to clarify the objective of these rules by adding the new paragraph.

Further, the only difference between these current sections and the new § 25.1183(c) is that the new paragraph addresses fire protection specifically at the ''component level,'' while the other requirements address fire protection at the ''zone level'' and the ''installation level.''

To meet the ''zone level'' or ''installation level'' objectives currently within part 25, the components of the installation must be sufficiently fireproof to comply with § 25.1183(c). Therefore, the FAA considers that the ''component level'' requirement is met inherently by meeting:

• The more general ''zone level'' requirements of § 25.1181 and § 25.1191, and

• The ''installation level'' requirements of § 25.901(c).

In other words, the requirements of § 25.1183(c) essentially are met already when an applicant properly shows compliance with § 25.1181, § 25.1191, § 25.901(c), and other part 25 [subpart E (''Powerplant'')] regulations.

What Is the Effect of the Amendment on Current Industry Practice?

The amendment neither adds any new or different objective to the current regulations, nor changes the way that any current certification practice is applied. Instead, the new added paragraph clarifies and codifies the way the FAA traditionally has applied the related rules. Specifying the fire protection requirement at all three levels—zone, installation, and component—in the regulations will help to ensure that, by looking at the same problem in many ways, an applicant will not overlook anything during design development and certification.

What Other Options Were Considered and Why Were They Not Selected?

The FAA has not considered another alternative. Revising part 25 to include the new paragraph eliminates an identified Significant Regulatory Difference (SRD) between the wording of part 25 and JAR–25, without affecting currently accepted industry design practices. The benefits of eliminating an SRD such as this are:

• More consistent interpretations of the rules can be expected,

• Harmonization goals are fulfilled, and

• The relations between regulatory authorities may be improved.

Is Existing FAA Advisory Material Adequate?

There currently is no formal advisory material specifically about § 25.1183. FAA Advisory Circular 20–135, ''Powerplant Installation and Propulsion System Component Fire Protection Test Methods, Standards, and Criteria,'' does reference § 25.1183 in some of its guidance. At this time, however, the FAA does not consider that further guidance material is needed.

What Comments Were Received in Response to the Proposal?

The FAA received four comments in response to the proposal. All of the commenters support the proposal.

One of these commenters also requests that the FAA change proposed paragraph 25.1183(c)(1) to clarify the phrase ''other regions of the airplane.'' The proposed text states that components must be fireproof if, when exposed to fire, they could result in fire spreading to ''other regions of the airplane.'' The commenter does not consider that this wording clearly means ''other regions *beyond* the designated fire zone,'' not merely to other regions *within* the fire zone.

The FAA agrees with the commenter's interpretation of the intent of the rule; however, we do not agree that a change to the rule text is necessary. The proposed text of the rule is identical to that of the current JAR 25.1183(c), and we are not unaware of any confusion that there has been on this issue with regard to JAR 25.1183(c). Therefore, to attain harmonization, the rule is adopted as proposed.

What Regulatory Analyses and Assessments Has the FAA Conducted?

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. We are not allowed to propose or adopt a regulation unless we make a reasoned determination that the benefits of the intended regulation justify its costs. Our assessment of this amendment indicates that its economic impact is minimal. Since its costs and benefits do not make it a ''significant regulatory action'' as defined in the Order, we have not prepared a ''regulatory impact analysis.'' Similarly, we have not prepared a ''regulatory evaluation,'' which is the written cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory and Policies and Procedures. We do not need to do the latter analysis where the economic impact of a proposal is minimal.

Economic Evaluation, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes or small entities. Third, the Trade Agreements Act (19 U.S.C. section 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate or by the private sector, of $100 million or more annually (adjusted for inflation.)

In conducting these analyses, FAA has determined that this rule:

1. Has benefits that do justify its costs, is not a ''significant regulatory action'' as defined in the Executive Order, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures;

2. Will not have a significant impact on a substantial number of small entities;

3. Reduces barriers to international trade; and

4. Does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

The (DOT) Order 2100.5, ''Regulatory Policies and Procedures,'' prescribes policies and procedures for simplification, analysis, and review of

regulations. If it is determined that the expected impact is so minimal that the rule does not warrant a full evaluation, a statement to that effect and the basis for it is included in the regulation. We provide the basis for this minimal impact determination below. We received no comments that conflicted with the economic assessment of minimal impact published in the notice of proposed rulemaking for this action. Given the reasons presented below, and the fact that no comments were received to the contrary, we have determined that the expected impact of this rule is so minimal that the final rule does not warrant a full evaluation.

Currently, airplane manufacturers must satisfy both the 14 CFR and the European JAR standards to certificate transport category aircraft in both the United States and Europe. Meeting two sets of certification requirements raises the cost of developing a new transport category airplane often with no increase in safety. In the interest of fostering international trade, lowering the cost of aircraft development, and making the certification process more efficient, the FAA, JAA, and aircraft manufacturers have been working to create, to the maximum possible extent, a single set of certification requirements accepted in both the United States and Europe. As discussed previously, these efforts are referred to as harmonization. This final rule results from the FAA's acceptance of an ARAC harmonization working group's recommendation. Members of the ARAC working group agreed that the requirements of this rule will not impose additional costs to U.S. manufacturers of part 25 aircraft.

Specifically, this rule adds JAR 25.1183(c) to 14 CFR § 25.1183. As discussed above, we have concluded that the only difference between the previously existing sections and new § 25.1183(c) added by this amendment is that the new paragraph will address fire protection specifically at the ''component level,'' whereas the existing requirements address fire protection at the ''zone level'' or the ''installation level.'' We have determined that the ''component level'' requirement is met inherently by meeting the more general, current ''zone level'' requirements. We consider that this rule will neither reduce nor increase the requirements beyond those that are already met by U.S. manufacturers to satisfy European airworthiness standards.

As this rule neither increases nor decreases certification requirements beyond those already in existence, we have determined there will be no cost associated with this rule to part 25 manufacturers. We have not tried to quantify the benefits of this amendment beyond identifying the expected harmonization benefit. This amendment eliminates an identified significant regulatory difference (SRD) between the wording of part 25 and JAR–25. The elimination of the SRD will provide for a more consistent interpretation of the rules and, thus, is an element of the potentially large cost savings of harmonization.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601–512, directs the FAA to fit regulatory requirements to the scale of the business, organizations, and governmental jurisdictions subject to the regulation. We are required to determine whether a proposed or final action will have a ''significant economic impact on a substantial number of small entities'' as defined in the Act.

If we find that the action will have a significant impact, we must do a ''regulatory flexibility analysis.'' However, if we find that the action will not have a significant economic impact on a substantial number of small entities, we are not required to do the analysis. In this case, the Act requires that we include a statement that provides the factual basis for our determination.

We have determined that this amendment will not have a significant economic impact on a substantial number of small entities for two reasons:

First, the net effect of the proposed rule is minimum regulatory cost relief. The amendment requires that new transport category aircraft manufacturers meet just the ''more stringent'' European certification requirement, rather than both the United States and European standards. Airplane manufacturers already meet or expect to meet this standard, as well as the existing part 25 requirement.

Second, all United States manufacturers of transport category airplanes exceed the Small Business Administration small entity criteria of 1,500 employees for aircraft manufacturers. Those U.S. manufacturers include:

- The Boeing Company,
- Cessna Aircraft Company,
- Gulfstream Aerospace,
- Learjet (owned by Bombardier Aerospace),
- Lockheed Martin Corporation,
- McDonnell Douglas (a wholly-owned subsidiary of The Boeing Company
- Raytheon Aircraft, and
- Sabreliner Corporation.

No comments were received that differed with the assessment given in this section. Since this final rule is minimally cost-relieving and there are no small entity manufacturers of part 25 airplanes, the FAA Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with that statute and policy, we have assessed the potential effect of this final rule and have determined that it supports the Administration's free trade policy because the rule will use European international standards as the basis for U.S. standards.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted yearly for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is considered to be a ''significant regulatory action.''

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

What Other Assessments Has the FAA Conducted?

Executive Order 3132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this final rule does not have federalism implications.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3507(d)], the FAA has determined there are no new requirements for information collection associated with this amendment.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. We determined there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

Energy Impact

The FAA has assessed the energy impact of this final rule accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94–163, as amended (43 U.S.C. 6362), and FAA Order 1053.1 We have determined that the amendment is not a major regulatory action under the provisions of the EPCA.

Regulations Affecting Intrastate Aviation in Alaska

Section 1205 of the FAA Reauthorization Act of 1996 (110 Stat. 3213) requires the Administrator, when modifying regulations in Title 14 of the CFR in a manner affecting intrastate aviation in Alaska, to consider the extent to which Alaska is not served by transportation modes other than aviation, and to establish such regulatory distinctions as he or she considers appropriate. Because this final rule would apply to the certification of future designs of transport category airplanes and their subsequent operation, it could affect intrastate aviation in Alaska.

Plain Language

In response to the June 1, 1998, Presidential memorandum regarding the use of plain language, the FAA re-examined the writing style currently used in the development of regulations. The memorandum requires Federal agencies to communicate clearly with the public. We are interested in your comments on whether the style of this document is clear, and in any other suggestions you might have to improve the clarity of FAA communications that affect you. You can get more information about the Presidential memorandum and the plain language initiative at *http://www.plainlanguage.gov.*

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements, Safety, Transportation.

In consideration of the foregoing, the Federal Aviation Administration amends part 25 of Title 14, Code of Federal Regulations as follows:

The Amendment

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

1. The authority citation for part 25 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, and 44704.

2. Amend § 25.1183 by adding a new paragraph (c) to read as follows:

§ 25.1183 Flammable fluid-carrying components.

* * * * *

(c) All components, including ducts, within a designated fire zone must be fireproof if, when exposed to or damaged by fire, they could—

(1) Result in fire spreading to other regions of the airplane; or

(2) Cause unintentional operation of, or inability to operate, essential services or equipment.

Issued in Washington DC on December 13, 2000.

Jane F. Garvey,

Administrator.

[FR Doc. 00–32320 Filed 12–18–00; 8:45 am]

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